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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-488

SEA-LAND SERVICE, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

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No.

SEA-LAND SERVICE, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Sea-Land Service, Inc., prays that a writ of certiorari be issued to review the decision of the United States Court of Claims in Docket No. 331-72, *Sea-Land Service, Inc. v. The United States* which was issued April 20, 1977.

OPINION BELOW

The opinion of the Court of Claims, reproduced in Appendix A to this Petition, is reported at 553 F.2d

651 (Ct. Cl. 1977). The initial decision of the Armed Services Board of Contract Appeals (ASBCA), (ASBCA No. 16218) appearing as Appendix B, is reported at 72-2 BCA ¶9605, p. 44,896. The decision of the ASBCA on remand (ASBCA No. 16218 Reinstated), reproduced as Appendix C, is reported at 76-2 BCA, ¶12,005, p. 57,589.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1255(1). The Court of Claims issued an Order on June 24, 1977, denying Petitioner's motion for rehearing to alter or amend the judgment of the Court entered on April 20, 1977, and suggestion for rehearing *en banc*. On September __, this Court granted Petitioner's Application to file its Petition by September 28, 1977.

QUESTION PRESENTED

Whether the Court of Claims erred in law by failing to apply applicable contract law and interpretation standards in holding that Petitioner could not recover for unforeseen and unforeseeable drastic increases in bunker fuel prices under a contract permitting Petitioner to nominate changes to, and additional items of cost and cost responsibility to be included in the contract.

STATUTE INVOLVED

The statute involved is the Wunderlich Act, 41 U.S.C. §§321-322.

STATEMENT OF THE CASE

Sea-Land entered into Contract No. 003371CA1464 ("Contract") with the Military Sea Transportation Service (now Military Sealift Command) (MSC) effective July 1, 1970. The Contract, drafted by the United States, provided for the transportation of military containerized cargo by Sea-Land for one year. Sea-Land filed the Contract with the Federal Maritime Commission as a statement of its rates and terms of service in carrying military cargo. The Contract resulted from MSC's Request for Proposals (RFP) bidding system under which ocean carriers submit proposals to transport military cargo at rates bid under the terms and conditions of the contract. The Contract did not preclude MSC from obtaining military transportation from the carriers at their commercial tariff rates available to the public.

Article I:9 of the contract provided:

> "Article I:9(a) As a means of facilitating the administration of this Agreement, *the parties have agreed that certain specific items of cost anticipated as likely to arise in the performance of their respective duties under Articles I:5, I:6 and I:8 shall be listed, and the cost responsibilities of the parties indicated, in a schedule attached hereto as Appendix B (MSTS Form 4280/7B) and made a part of this Agreement.* Determinations of respon-

sibility for specific items of cost agreed to by the parties under this Article are to be consistent with the general language of Articles I:5, I:6 and I:8; provided, however, in the event of conflict, the specific language of Appendix B shall prevail.

"(b) *Either party may nominate changes to or additional items of cost and cost responsibility to be incorporated into Appendix B.* Such nominating party shall serve upon the other party a written nomination, together with a detailed statement of all pertinent facts and appropriate supporting data necessary for a determination of the cost responsibility under Articles I:5, I:6 and I:8. If the other party agrees in writing to the nomination, such nomination will be incorporated into Appendix B as of the agreed effective date. Failure of the other party to agree to the nomination within a period of thirty (30) days from its receipt, or within a mutually agreeable greater period, shall constitute a dispute concerning a question of fact within the meaning of that term in the Article entitled Disputes in Part III of this Agreement." (Emphasis added)

The Military Sea Transportation Service distributed an annotation to these Contract clauses, when first published, providing in part:

> "It is assumed that where an arbitrary determination results in greater convenience but involves substantial costs, appropriate adjustments will be made in the determination of rates, including the establishment of surcharges."[1]

[1] The full text of the annotation is:

"[24] Attached to this edition of the Shipping Agreement is a pro forma Appendix B. It is included as a means of providing a format, as well as a basis for initial discussions. In indicating cost responsibility no attempt has been made

(continued)

Sea-Land included in its costs "anticipated as likely to arise", to determine its rates bid under the Contract the amount of $2.00 per barrel for bunker fuel, an amount based on Sea-Land's bunker fuel experience and best judgment of fuel costs during the contract period. Subsequent to the effective date of the Contract, bunker fuel prices drastically increased to then unprecedented levels. In January 1971, Petitioner, acting under Article I:9(b) of the Contract, nominated as an additional item of cost and cost responsibility a bunker fuel surcharge. The Contracting Officer rejected Petitioner's nomination on March 16, 1971. Thirteen days later, and still within the contract period, MSC announced the addition of a "bunker escalation provision . . . to cover fuel cost fluctuations" to the next military cargo contracts covering the period July 1, 1971-June 30, 1972. The clause was attributed to "recent drastic fluctuations of bunker fuel costs". MSC

(footnote continued from preceding page)

to conform precisely to existing practices under current shipping contracts. The pro forma Appendix B is attached without prejudice to the right of the Government to take a different position regarding cost responsibility, both in discussions concerning this Agreement and in situations arising under the Shipping Contract. In situations where the cost responsibility may vary depending on complicated facts applicable on a case-by-case basis, or where precise cost accounting is difficult or unduly expensive, considerable importance should be given to the goal of facilitating world-wide 'on the pier' administration, which may result in arbitrary determinations to establish uniform practices designed to result in maximum convenience of the parties. It is assumed that where an arbitrary determination results in greater convenience but involves substantial costs, appropriate adjustments will be made in the determination of rates, including the establishment of surcharges."

cancelled Article I:9(b) from its contracts effective July 1, 1972.

Petitioner's appeal of the Contracting Officer's denial of Petitioner's claim was rejected by the ASBCA, in a decision limited by agreement of the parties to the question of Petitioner's entitlement to recover.[2] The United States Court of Claims (Court), on appeal of the ASBCA decision, remanded the case to the ASBCA "to determine whether the drastic increase in the cost of bunker fuel, on which plaintiff predicates this claim, was foreseen by plaintiff when it entered into the Contract on July 1, 1970, or was reasonably foreseeable at that time as likely to arise during the contract period".[3]

The ASBCA, after evidentiary hearings, supported Petitioner's positions, and concluded that "Sea-Land did not in fact foresee the drastic increase in the cost of bunker fuel which occurred during the contract period" and "that the drastic increase in prices which actually occurred during the period of this contract was not reasonably foreseeable".[4]

Another panel[5] of the Court of Claims, without discussion of the two findings requested by the initial panel and the ASBCA decision supporting Petitioner's positions, and agreeing that the case is "a question of law",[6] affirmed the initial decision of the ASBCA

[2]The ASBCA decision is Appendix B.

[3]This Order is Appendix D to this Petition. The Order is noted at 497 F.2d 928 (1974).

[4]Appendix C, pp. 40c, 41c.

[5]One Judge was common to both panels.

[6]Appendix A, p. 10a.

denying Petitioner's right to recover.[7] The Court did not find the Contract ambiguous, and refused to apply the *contra proferentem* rule.[8] Yet it determined that the "nomination of the increased cost of fuel was neither the nomination of *a change to an existing item* nor the nomination of *an additional item* and was inconsistent with Article I:5(a)(1).[9] The Court found the Contract a fixed price contract despite the provisions of Article I:9(b) and other clauses.[10] The Court refused to give meaning to MSC's acknowledgement prior to the end of the Contract of its responsibility for escalations in bunker fuel costs.[11] The Court failed to discuss Article I:9(a) of the Contract, which required the listing by the parties only of those "certain specific items of cost anticipated as likely to arise" in the performance of their respective duties. It refused to apply the "custom of the trade".[12] On June

[7]The Court of Claims decision is Appendix A.

[8]Appendix A, pp. 10a, 12a.

[9]Appendix A, p. 11a (Emphasis in decision).

[10]The Contract also provided for increases in rates above the Schedule of Rates for vessel reroutings for canal blockages (Article I:15), reimbursement of extra expenses for diversion or short stop of containers for convenience of the Government (Article I:13), reimbursement of percentages of war risk insurance premiums and crew bonuses (Article I:14), payment of expenses or penalties arising from the Government causing overweight containers (Article I:18), surcharges for increases at Government facilities exceeding 10% of the charges in effect when the Government accepted the carrier's offer of rates (Article I:25). The Contract did not bind the Government to pay the rates bid if a bidding carrier's commercial rates to the public were more favorable than the rates bid. Appendix B, p. 5b.

[11]Appendix A, p. 12a.

[12]Appendix A, p. 12a.

24, 1977, the Court denied Petitioner's Motion for Rehearing.

During the contract period, MSC paid bunker fuel surcharges to vessels under military charter, but did not pay increased fuel costs to other carriers which had entered into contracts like that of Petitioner.[13] Carriers, including Petitioner, assessed bunker fuel surcharges on regular commercial shipments. The Federal Maritime Commission (Commission), in January 1972, found ocean carriers other than Petitioner in violation of the Shipping Act, 1916[14] for failing to impose a fuel surcharge on military cargo while imposing a surcharge on commercial cargo.[15] The Commission found Petitioner no longer in violation of the Shipping Act since Petitioner had "imposed the surcharge and pursued its remedy before the ASBCA".[16] The Commission subsequently rescinded its Order as to other carriers, holding the ultimate decision on Petitioner's claim before the ASBCA would apply to the other carriers.[17] The Contract required Petitioner to comply expeditiously

[13] The claims of these other carriers have been held in abeyance pending the decision of this Court on this Petition.

[14] 46 U.S.C. §801 *et seq.*

[15] Violations of Sections 14 Fourth, 16 First and 17, Shipping Act, 1916, In the Nonassessment of Fuel Surcharges on Military Sealift Command (MSC) Rates Under the MSC Request for Rate Proposals (RFP) Bidding System, 15 F.M.C. 92 (1972).

[16] 15 F.M.C. at 96.

[17] The Commission's Order discontinuing the proceeding is not officially reported, but is unofficially reported at 13 Shipping Regulations Reports (Pike and Fischer) 526 (Docket No. 71-17) (FMC 1973).

with Commission regulations as may be applicable to the filing of rates set out in the Schedule of Rates[18] and noted the "custom of the trade" as a standard of performance.[19]

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims conflicts with governing cases and standards of contract interpretation, including decisions of this Court.

The interpretation of contract terms is a question of law.[20] But the Court here erred in failing to apply contract law to the Contract. Words of a contract are to be given normal meanings.[21] A contract should not

[18] Article I:16 of the Contract provided: "The Carrier agrees to comply expeditiously with such regulations of the Federal Maritime and Interstate Commerce Commissions as may be applicable to the filing of rates set out in the SCHEDULE OF RATES for service to the Government in the carriage of military cargo."

[19] Article I:12 of the Contract provided: "Wherever the 'Custom of the Trade' is the standard of performance by either party under the provisions of these Basic Terms, that phrase shall mean the established practice generally accepted by the Trucking, Rail and Marine Shipping Industries for container transportation service."

[20] KECO Industries v. United States, 364 F.2d 838, 842 (Ct. Cl. 1966); Appendix A, p. 10a.

[21] United States v. Atlantic Refining Company, 360 U.S. 19, 22 (1959); Eastern Gas and Fuel Association v. Midwest-Raleigh, Inc., 374 F.2d 451, 454 (4th Cir. 1967), cert. denied, 389 U.S. 951 (1967).

be interpreted as to render a provision meaningless and surplusage.[22] The contract provided:

> "Either party may nominate changes to or additional items of cost and cost responsibility to be incorporated into Appendix B."

This is a simple, declarative, unambiguous sentence. The words have ordinary and normal meaning. The Court has interpreted the Contract as to eliminate this provision, rendering it meaningless. Sea-Land nominated a bunker fuel cost to be recovered from the Government. Clearly bunker fuel is a cost. The Court held that the items in Appendix B had a dollar value and determined that a carrier has the responsibility for increases.[23] The Government had the responsibility for these costs. If Petitioner could have foreseen them, or even if the costs were reasonably foreseeable, Petitioner would have included the costs in the rates bid under the Contract. The Government is responsible for paying these costs. Assuming for argument that the Court is correct in determining that the costs are the responsibility of the Petitioner, then Petitioner's nomination is a change to an item of cost responsibility to be incorporated into the Contract. The Court's interpretation gives no meaning whatever to the above-quoted provision of Article I:9(b) of the Contract.

The Court's interpretation likewise renders meaningless Article I:9(a) of the Contract. The parties there agreed that the rates bid would reflect the "certain

[22]Meighan v. Finn, 146 F.2d 594 (2d Cir. 1944), affirmed, 325 U.S. 300 (1945); Hol-Gar Manufacturing Corp. v. United States, 351 F.2d 972, 979 (Ct. Cl. 1965).

[23]Appendix A, p. 11a.

specific items of cost anticipated as likely to arise in the performance of their respective duties." This provision reflects the obvious. A carrier has no basis for including in its rates, costs which it is not likely to incur in performing its transportation services under the Contract, "drastic" cost increases which the carrier did not foresee and could not foresee in submitting its rates. The only interpretation which gives meaning to Articles I:9(a) and I:9(b), is one in which the carrier is obliged to make a reasonable and informed judgment of costs "anticipated as likely to arise" (Article I:9(a)), with the opportunity for the carrier (or the government) to obtain adjustments for unforeseen or unforeseeable changes through the mechanism of Article I:9(b). Petitioner urged this interpretation upon the Court in its initial argument. The Court remanded the case to the ASBCA to determine whether the drastic increases in bunker fuel costs were unforeseen and unforeseeable, as Petitioner contended. The ASBCA agreed with Petitioner. The Court then erred in ignoring the issues remanded and failing to give meaning to the plain language of Articles I:9(a) and I:9(b), and interpreting the Contract as to make meaningless the first sentence of Article I:9(b).[24]

The Court's intepretation fails to give reasonable meaning to the Contract as a whole. The purpose of the

[24]The Court's statement that the nomination of a drastic increase in fuel costs was inconsistent with Article I:5(a)(i) is without merit. Article I:9(b) does not require "consistency" in order to "nominate". Further, no inconsistency exists because nothing in Article I:5 precludes adjustments in the Schedule of Rates. That Article provides that carriers shall be paid at the rates in the Schedule of Rates, whatever those rates may be.

Contract was the transportation of military container cargoes by Petitioner, acting as a common carrier,[25] with rates bid according to costs likely to arise during the Contract period. The Contract provides for various adjustments for specific events which might occur during the Contract period,[26] and for unforeseen or unforeseeable contingencies through Article I:9(b). The Contract and the rates would be filed with the Federal Maritime Commission, consistent with Petitioner's operations as a common carrier. Customs of the trade would be a standard of performance. Bunker fuel surcharges were the custom of the trade during the Contract period, and were filed with the Federal Maritime Commission. The Court's interpretation removes the government from the normal commercial practices of the time, is inconsistent with the common carrier services and charges for these services normally imposed by Petitioner, and thus is not a reasonable interpretation of the purposes of the Contract considered as a whole and in light of the surrounding circumstances.

Petitioner does not contend that the Contract is ambiguous. The ambiguity results from the Court's interpretation. The Court has determined that, under a contract allowing a party to nominate items of cost and cost responsibility, a party cannot nominate items of cost and cost responsibility. The interpretation at the very least makes the Contract ambiguous. The government is the author of the Contract. The Court had the obligation to resolve any ambiguity against the

[25]Appendix A, p. 2a.

[26]See, fn. 10, p. 7, above.

government.[27] It erred in not doing so. This rule "puts the risk of ambiguity, lack of clarity, and absence of proper warning on the drafting party which could have forestalled the controversy; it pushes the drafters toward improving contractual forms; and it saves contractors from hidden traps not of their own making."[28] The rule is particularly appropriate here, where the government's annotation interpreted the clause as allowing "surcharges" where arbitrary determinations result in "substantial costs."[29]

The Court should have considered the government's acknowledgment of its obligation to pay for drastic increases in bunker fuel costs under military cargo transportation contracts. The acknowledgment occurred during the Contract period. It reflects the proper interpretation of the Contract by the parties to it. Petitioner performed no different services for the government under subsequent contracts than it did under the Contract here. Rates were bid in the same way. Contrary to the decision,[30] "courts may look to subsequent agreements and acts of the parties to determine their mutual construction of the language of a previously executed agreement."[31]

[27]Sun Shipbuilding and Dry Dock v. U.S., 393 F.2d 807, 816 (Ct. Cl. 1968); Singer-General Precision, Inc. v. U.S., 427 F.2d 1187, 1193 (Ct. Cl. 1970); Garrison v. United States, 7 Wall. 688 (1869).

[28]Sturm v. United States, 421 F.2d 723, 727 (Ct. Cl. 1970).

[29]See fn. 1, pp. 4-5 above.

[30]Appendix A, p. 12a.

[31]Trans Ocean Van Service v. United States, 426 F.2d 329, 336 (Ct. Cl. 1970).

2. The decision is inconsistent with the decision in *DeBry and Hilton Travel Services, Inc. v. Capitol International Airways* on a matter of important and continuing public and legal interest.

The decision below is inconsistent with the holding of the United States Court of Appeals for the Tenth Circuit in *DeBry and Hilton Travel Services, Inc. v. Capitol International Airways, Inc.*[32] This Court has granted petitions for writs of certiorari to resolve conflicts between decisions of United States Circuit Courts of Appeals and the United States Court of Claims.[33] *DeBry* did not involve the specific contract here, but did concern a charter contract for transportation at an offered price with the price, as here, filed as the tariff of the transporting carrier. The court in *DeBry* determined that the charter contract did not preclude a price adjustment for unforeseen fuel price increases. Air carriers "must have a means of protecting themselves from unforeseen circumstances such as the 1973 oil crisis," especially since contracts are to be performed months into the future.[34] The contract interpretation approved by the Court of Appeals "reflects the custom and usage of the supplemental air

[32]DeBry and Hilton Travel Services, Inc. v. Capitol International Airways, Inc., 541 F.2d 855 (10th Cir. 1976). This decision was brought to the attention of the Court of Claims prior to its decision, but was not cited or discussed in that decision.

[33]Helvering v. Inter-Mountain Life Insurance Company, 294 U.S. 686, 689 (1935); Waterman Steamship Corp. v. United States, 381 U.S. 252, 258 (1965).

[34]541 F.2d at 857.

carrier industry."[35] The contract at issue here and the rates bid likewise were filed with the Federal Maritime Commission. Petitioners operated under the Contract as a common, not contract, carrier,[36] and was obliged to comply with regulations of the Federal Maritime Commission regarding the filing of rates.[37] The Commission determined that failure to impose bunker surcharges on military cargo while imposing them on commercial cargo could violate the Shipping Act.[38] The Contract likewise cited the "Custom of the Trade" as a standard of performance.[39] The "custom of the trade" for common carriers was to assess bunker surcharges for the drastic increases in bunker fuel prices. The custom of the trade for MSC was to pay bunker surcharges for vessels under charter. The Court of Claims erred in refusing to apply the custom of the trade,[40] consistent with the Contract terms and the *DeBry* decision, and in precluding Petitioner from complying with the Maritime Commission directive to apply bunker surcharges to military cargo, consistent with Article I:16 of the Contract.

The present case, like the *DeBry* case, involves an important and recurring public and legal issue–the

[35]541 F.2d at 858.

[36]Appendix A, p. 2a.

[37]Article I:16 of the Contract, quoted at p. 9, fn. 18 above.

[38]Violations of Sections 14 Fourth, etc., p. 8, fn. 15, above.

[39]Article I:12 of the Contract, quoted p. 9, fn. 19, above. Custom and usage may be used to determine the meaning and intention of the parties to a contract. Robinson v. United States, 13 Wall. 363, 364 (1872).

[40]Appendix A, p. 12a.

impact upon contractual rights and obligations of drastic increases in fuel prices. *DeBry* allowed recovery for unforeseen costs. The Court of Claims has also allowed recovery of unforeseeable costs.[41] The decision in this case, refusing recovery, is inconsistent with *DeBry* and cases allowing recovery. These inconsistencies should be resolved.

CONCLUSION

The effect of unforeseen and unforeseeable drastic increases in fuel prices on contractual rights and obligations is a matter of important public and legal interest. The decision of the Court of Claims is inconsistent with decisions allowing recovery of such costs, and contrary to applicable contract law. A writ of certiorari should issue to review the opinion and decision of the United States Court of Claims.

Respectfully submitted,

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September 28, 1977

[41] Hoffman v. United States, 340 F.2d 645 (Ct. Cl. 1964).

APPENDIX A

In the United States Court of Claims

No. 331-72

(Decided April 20, 1977)

SEA-LAND SERVICE, INC. v. THE UNITED STATES

Paul J. McElligott, attorney of record for plaintiff. *Ragan & Mason*, of counsel.

Raymond B. Benzinger, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before SKELTON, NICHOLS, and BENNETT, *Judges*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

The plaintiff, Sea-Land Service, Inc. (Sea-Land) a common carrier by water within the Shipping Act, 1916, 46 U.S.C. § 801, *et seq.*, entered into Contract N0003371CA1464 with the Military Sea Transportation Service (now Military Sealift Command (MSC)), of the Department of the Navy, effective July 1, 1970, and extending one year to June 30, 1971, for the transportation of containerized cargo between the United States and various foreign ports. The contract was drafted by the United States and was filed by Sea-Land with the Federal Maritime Commission as a statement of rates, terms, and

conditions of the service to be furnished by the plaintiff. The pertinent provisions of the contract were as follows:

• • • • •

ARTICLE I:1 *DESCRIPTION OF SERVICES*

The Carrier represents that he is a common carrier by water within the meaning of the Shipping Act of 1916, as amended; that he operates or will inaugurate by the date stated in the STATEMENT OF RATES an established berth service on the trade routes for which rates are quoted in the SCHEDULE OF RATES, and that he maintains on such routes regularly scheduled sailings of United States flag vessels. The Carrier further represents that he offers container service on the above designated routes to the public for the carriage of commodities having the general shipping characteristics of those for which service may be performed under this Agreement . . . . The term 'Container Service' as used in this Agreement means the movement of cargo in Carrier or Government-furnished containers and the transportation of Government containers, on regularly scheduled vessel sailings for the general public at duly published rates, terms and conditions. In carrying cargoes for the Government in containers in any of his scheduled vessels as provided in this Agreement, the Carrier shall carry as a common carrier.

ARTICLE I:2 *TERMS OF CONTRACTUAL RELATIONSHIP*

(a) The purpose of this Agreement is to establish the terms under which the Carrier offers to accomplish the transportation in containers of such lawful cargo . . . as may be tendered from time to time by the Government for carriage under the Agreement. When transportation services are ordered under this Agreement, a Shipping Order substantially in the form attached hereto as Appendix A . . . will be issued by the Government. The Government will also prepare all necessary papers including vessel papers or manifests listing the cargo stowed in containers aboard the vessel and such will be receipted for by the Carrier or his agent. Such papers, including vessel papers or manifests, shall be evidence of ownership and together with the Shipping Order constitute the contract of carriage, and all the terms of this

Agreement shall be deemed as incorporated therein as part thereof . . . .

• • • • •

(e) Nothing in this Agreement shall be construed as restricting competition in any manner or as precluding the Government from obtaining transportation from the Carrier on the routes covered herein under the published tariffs of the Carrier that are available to the public, provided goods to be so carried shall be tendered in accordance with the terms and conditions of those tariffs and for carriage under a standard form of Government Bill of Lading . . . .

ARTICLE I:3 *COMPENSATION*

Compensation for carriage of goods under this Agreement shall be in accordance with the SCHEDULE OF RATES . . . .

• • • • •

ARTICLE I:5 *SCOPE OF SERVICE*

(a) The Carrier shall furnish the following services for which rates are published in the SCHEDULE OF RATES.

(i) BASIC SERVICE: *The Carrier's basic service for which he shall be paid at the basic rates set forth in the SCHEDULE OF RATES* shall consist of furnishing a clean empty container on a trailer to the Government at his terminal; receiving and handling the stuffed container at his loading terminal; loading and *transporting the container in his vessel;* discharging and handling the container at his receiving terminal; furnishing the container on a trailer; and paying all port charges occurring against the container and its contents except charges measured by the volume, weight or value of the cargo.

(ii) DRAYAGE SERVICE: The Carrier's drayage service for which he will be paid at the drayage rates set forth in the SCHEDULE OF RATES . . . .

(iii) STOP-OFF SERVICE: The Carrier's stop-off service for which he shall be paid at the stop-off rates set forth in the SCHEDULE OF RATES . . . .

(iv) STUFFING SERVICE: The Carrier's stuffing service for which he shall be paid at the stuffing rates set forth in the SCHEDULE OF RATES . . . .

(v) TEMPERATURE RECORDING SERVICE: The Carrier's temperature recording service for which he shall be paid at the temperature recorder rate set forth in the SCHEDULE OF RATES shall consist of furnishing a continuous temperature recording instrument in each refrigerated container when so requested by the Contracting Officer at the time the container is ordered . . . .

(vi) SUPERCARGO TRANSPORTATION SERVICE: The Carrier's supercargo transportation service for which he shall be paid at the supercargo transportation rate set forth in the SCHEDULE OF RATES . . . .

(b) Freight shall be computed for each container and shall consist of the sum of all payments due for each of the above services actually furnished in accordance with the orders of the Contracting Officer as set forth in the Shipping Order.

ARTICLE I:6 *GENERAL CONDITIONS OF SERVICE*

. . . .

[This article contained detailed provisions covering miscellaneous activities such as notice to spot, pick up, and remove containers, the use of trailers for moving containers during stuffing, avoidance of areas unsafe for tractors and trailers, delivery of containers at point of discharge, provision of information regarding each container, notice of impending arrival of the vessel, and maintenance of refrigeration for refrigerated containers.]

• • • • •

ARTICLE I:8 *PORT CHARGES*

The Carrier shall pay all port charges, canal tolls and similar charges (properly for the account of the vessel) including such charges assessed at Government installations.

ARTICLE I:9 *SCHEDULE OF COST RESPONSIBILITIES*

(a) As a means of facilitating the administration of this Agreement, the parties have agreed that certain specific items of cost anticipated as likely to arise in the performance of their respective duties under Articles I:5, I:6 and I:8 shall be listed, and the cost responsibilities of the parties indicated, in a schedule attached hereto as Appendix B . . . and made a part of this Agreement. *Determinations of responsibility for specific items of cost*

agreed to by the parties under this Article are to be consistent with the general language of Articles I:5, I:6 and I:8; provided, however, in the event of conflict, the specific language of Appendix B shall prevail.

(b) *Either party may nominate changes to or additional items of cost and cost responsibility to be incorporated into Appendix B.* Such nominating party shall serve upon the other party a written nomination, *together with a detailed statement of all pertinent facts and appropriate supporting data necessary for a determination of the cost responsibility under Articles I:5, I:6 and I:8.* If the other party agrees in writing to the nomination, such nomination will be incorporated into Appendix B as of the agreed effective date. Failure of the other party to agree to the nomination within a period of thirty (30) days from its receipt, or within a mutually agreeable greater period, shall constitute a dispute concerning a question of fact within the meaning of that term in the Article entitled 'Disputes' in Part III of this Agreement.

• • • • •

ARTICLE I:19 *SCHEDULE OF RATES*

(a) The SCHEDULE OF RATES is a part of the MSTS Container Agreement. It consists of SECTION I, STATEMENT OF BASIC RATES; SECTION II, STATEMENT OF DRAYAGE RATES; SECTION III, STATEMENT OF MISCELLANEOUS RATES; AND SECTION IV, STATEMENT OF RATES FOR CARRIAGE OF GOVERNMENT CONTAINERS.

(b) SECTION I consists of a separate Statement of Basic Rates for each route for which the parties have negotiated rates . . . .

(c) SECTION II consists of a Statement of Drayage Rates, and the rates stated therein shall apply when the Carrier is ordered to dray a container between his terminal where the container is loaded on or discharged from his ship and another place . . . .

(d) SECTION III consists of Statement of Stuffing Rates, Stop-off Rates, Demurrage Rates (Charges for Container Detention) and other Miscellaneous Rates.

(e) SECTION IV consists of a Statement of Rates for Carriage of Government-Owned or Leased Containers and the rates, terms and conditions stated therein shall apply to services furnished by the Carrier in connection with containers, other than Carrier-owned containers, which are offered by the Government for shipment.

ARTICLE I:20 *ADDITIONS AND REVISIONS*

(a) Except during the one year period for which the parties have agreed that rates stated in SECTION I, SECTION II, SECTION III, and SECTION IV shall remain effective, the SCHEDULE OF RATES may be amended by the parties in the following manner. Either party may propose in writing that all or a portion of the SCHEDULE OF RATES be amended. No later than thirty (30) days from receipt of such proposal the parties shall undertake to negotiate such an amendment and, if agreement is not reached within sixty (60) days from the commencement of such negotiations, the Carrier shall have the option of withdrawing that portion of the SCHEDULE OF RATES which is the subject of the dispute, such withdrawal being effective after thirty (30) days notice in writing to the Government and being subject to the requirements of applicable statutes and of rules and regulations of cognizant Government agencies.

* * * * *

Appendix B to Part I, referred to in Article I:9, set forth above, contained the following pertinent matter (with emphasis added):

APPENDIX B

SPECIFIC ITEMS OF COST IN CONNECTION WITH PERFORMANCE UNDER ARTICLES I:5, I:6 AND I:8 AND AGREED DETERMINATION OF COST RESPONSIBILITY AS BETWEEN THE PARTIES

1. *Responsibility of the Carrier*

The Carrier is responsible for the cost of the following services:

a. Furnishing and maintaining containers and trailers except when trailers are waived or containers or trailers are furnished by the Government
b. Drayage (when ordered) . . . .
c. *Port charges and other expenses applicable to the Carrier's vessel:*
   (1) Pilotage
   (2) Tug hire
   (3) Line handling
   (4) Utilities and other services required by the vessel

   (5) Dues (including harbor and quay dues), fees (including light-house fees) and/or taxes assessed against the vessel
   (6) Dockage (or side wharfage), berthage, sheddage, wharfage (or top wharfage)
   (7) Agency fees
   (8) Canal transit tolls
   (9) Customs
   (10) All charges in connection with vessel entrance and clearance
   (11) Special fire or security watch required as a condition to stay in port
   (12) Terminal service and facilities charges at commercial piers
   (13) *Other costs in connection with operation of the ship*

* * * * *

[Emphasis supplied.]

The contract also contained the standard disputes clause.

On January 4, 1971, Sea-Land applied to defendant for a temporary bunker fuel surcharge on rates in the contract based on "drastic increase in the cost of bunker fuel on a worldwide basis." The defendant rejected plaintiff's application on January 5, 1971, on the ground that there were no provisions in the contract that authorized a rate increase to cover increases in the cost of bunker fuel.

On January 18, 1971, plaintiff, purporting to act in accordance with Article I:9(b) of the contract, nominated "as a change or additional item of cost and cost responsibility, to be incorporated into Appendix B, a bunker surcharge to cover the bunker fuel price recently imposed by suppliers." The plaintiff also cited the "custom of the trade" to impose bunker surcharges, which had been recognized by the Federal Maritime Commission. The plaintiff justified its action by citing the drastic increases in bunker fuel and an expected further increase in early 1971. The defendant denied plaintiff's nomination on the ground that it was inconsistent with Articles I:5, I:6, and I:8 of the contract. Plaintiff appealed to the Armed Services Board of Contract Appeals (ASBCA or Board). The Board

denied plaintiff's appeal on August 4, 1972.[1] The decision of the Board was as follows:

DECISION

Meaning of Contract Provisions. The dispute ultimately concerns the meaning of Article I:9(b) of the "basic terms of agreement," viewed in the context of Article I:9(a), Appendix B, and the other related provisions, such as Articles I:3, I:5(a)(i) and (b), and I:20(a).

We are unable to entertain the view advanced by appellant that Article I:9(b) provides a means for escalating freight rates to compensate for the increased cost of bunker fuel as measured by the claimed surcharge or otherwise.

Appellant's claim tacitly assumes that the cost items in Appendix B had a dollar value at the outset, and that consequently, when a higher dollar cost is actually experienced for an item present in Appendix B as a carrier responsibility, the increase can be nominated by the carrier as a "change to" or "additional item of cost" under Article I:9(b).

Such is not the case. Appendix B describes costs only by nature, kind, or character without regard to any dollar amount and without any warranty against inclusion of contingency factors in rates. Contrary to appellant's assumption, the contract in truth is cast in terms which provide that the risk of dollar increases in costs of the items of cost assigned to the carrier shall be covered by the stipulated rates. Article I:5(a)(i) makes transportation of the container, along with handling etc., the basic service for which rates are to be paid. Transportation at a given rate is, therefore, central to the principal apparent purpose of the contract; and Article I:3 makes the rates the compensation to be paid. Appendix B 1c(13) makes costs in connection with the operation of the vessel (in addition to those expressly mentioned in Appendix B 1c(1) through (12)) part of the cost responsibility of the carrier. There is no contention or evidence of the existence of any applicable usage which by implication would exclude the cost of fuel from the cost of operation of the vessel under this type of berth service contract in the absence of an express exclusion, and appellant necessarily concedes that the cost of fuel was not excluded here. Moreover, under Article I:20(a) the rates are intended to continue unchanged for a year.

[1] ASBCA No. 16218, 72-2 BCA ¶ 9605.

Thus the entire thrust of the relevant contract provisions, particularly Article I:5(a)(i) and Appendix B 1c(13), is to place the risk of increases in bunker fuel costs (and the benefit of any decline) on the carrier. In making a nomination under Article I:9(b) a party is required to demonstrate consistency with Article I:5(a)(i). Nomination of the added dollar cost of fuel is neither the nomination of a change to an existing item nor the nomination of an additional item, is inconsistent with Article I:5(a)(i), and would frustrate the principal apparent purpose of the contract.

Conclusion. In our opinion, the contract, interpreted in accordance with the usual canons of interpretation, unambiguously excludes entitlement to recovery, under Article I:9(b) of the "basic terms of agreement," of the increased cost of bunker fuel by surcharge or otherwise. See *Restatement, Contracts (1932)*, see 230, 235, 236 (a), (b). Accordingly, the appeal is denied.

Plaintiff filed this suit on August 29, 1972, seeking review and reversal of the decision of the Board under the standards of the Wunderlich Act, 41 U.S.C. §§ 321, 322 (1970). It seeks to recover $2.00 per ton on 4,077,009 tons of transported cargo. The case was heard by a panel of the court which entered an order on May 31, 1974, 204 Ct.Cl. 912, which provided:

> * * * [T]he case is remanded to the Armed Services Board of Contract Appeals, under Public Law 92-415 and General Order No. 3 of 1972, to determine whether the drastic increase in the cost of bunker fuel, on which plaintiff predicates this claim, was foreseen by plaintiff when it entered into the contract on July 1, 1970, or was reasonably foreseeable at that time as likely to arise during the contract period;

On remand, the Board issued its opinion on April 30, 1976, holding that the drastic increase in bunker fuel prices was not foreseen by the plaintiff and, by a three to two decision held that such increase was not reasonably foreseeable. The Board did not change its opinion of August 4, 1972, *supra*.

The case is now before us on plaintiff's motion and defendant's cross-motion for summary judgment.

Plaintiff contends that the decision of the Board was arbitrary, capricious, and not supported by substantial

evidence. We do not agree and conclude that the contrary was true. Plaintiff argues further that we are not bound by the decision of the Board in interpreting the contract since this is a question of law. We agree that this is a correct statement, but we conclude that the Board correctly interpreted the contract and we approve the interpretation which it made. We find no fault with the decision of the Board and conclude that its decision should be affirmed.

Plaintiff argues that the contract is ambiguous and all doubts should be resolved against the defendant who drafted the contract in accordance with the *contra proferentem* rule. We do not agree that the contract is ambiguous and, consequently, we do not apply the aforesaid rule. *See ITT Arctic Services, Inc.* v. *United States*, 207 Ct. Cl. 743, 524 F.2d 680 (1975). It should be remembered that the contract is a fixed price contract under which the plaintiff was to furnish specified services for specified payments for a period of one year. There was no provision for escalating the amounts that would be paid to the plaintiff. The plaintiff would engraft an escalation clause on the fixed price contract, which cannot be done in the circumstances of this case. It is unfortunate that the plaintiff got caught by the increase in price of the bunker fuel, but that was a risk it assumed under the terms of the contract. As the Board pointed out, Article I:3 makes the rates the compensation to be paid and Appendix B1c(13) makes costs in connection with the operation of the vessel, which certainly includes bunker fuel, the responsibility of the carrier. Furthermore, under Article I:20 the specified rates were to continue unchanged for the period of one year.

Plaintiff relies on its right to nominate "changes to or additional items of cost and cost responsibility to be incorporated into Appendix B." This article does not mean that plaintiff by simply nominating bunker fuel cost increases, binds the government by such nomination and that this amounts to an escalation clause that increases the rates. Article I:9(b) states that any nomination must comply with Articles I:5, I:6 and I:8. Article I:5 states that the carrier "shall be paid at the basic rates set forth in the

schedule of rates." Plaintiff's nomination does not comply with this article. Article I:6 deals only with general conditions of service and is not particularly relevant here. Article I:8 requires the carrier to pay all port charges.

We agree with the Board that Article I:9(b) does not provide a means for escalating freight rates to compensate for increased cost of bunker fuel. That article states that "either party may nominate changes to or additional items of cost and cost responsibility to be incorporated into Appendix B." As the Board held, the cost items in Appendix B had a dollar value, and when that dollar value increased as to any item that was a carrier responsibiiity, such increase cannot be nominated by the carrier as a "change to" or "additional item" of cost under Article I:9(b). The Board correctly stated that "Appendix B describes costs only by nature, kind, or character without regard to any dollar amount and without any warranty against inclusion of contingency factors in rates. Contrary to appellant's assumption, the contract in truth is cast in terms which provide that the risk of dollar increases in costs of the items of cost assigned to the carrier shall be covered by the stipulated rates. Article I:5(a)(i) makes transportation of the container * * * the basic service for which rates are to be paid. * * * Article I:3 makes the rates the compensation to be paid. Appendix B1c(13) makes costs in connection with the operation of the vessel [which includes bunker fuel costs] part of the cost responsibility of the carrier."

We conclude that the contract placed the risk of increases in bunker fuel costs on the plaintiff. When Sea-Land made the nomination under Article I:9(b) it failed to show it was consistent with Article I:5(a)(i). The nomination of the increased cost of fuel was neither the nomination of a *change to an existing item* nor the nomination of *an additional item* and was inconsistent with Article I:5(a)(i). Actually, plaintiff's nomination as to increased fuel costs was an effort on its part to force the defendant to pay a part of the costs of the operation of the vessel, which was clearly its obligation under the contract.

Plaintiff argues further that the defendant should be required to pay the increased fuel costs because during plaintiff's appeal the government modified follow-on contracts by adding, effective July 1, 1971, an escalation clause to cover fluctuations in costs of bunker fuel. Such change did not affect the contract in issue here, because it terminated on July 1, 1971, which was the date the change became effective. It is well settled that only actions and interpretations which occur before a controversy arises are relevant in determining and interpreting the meaning of a contract. *See Liles Constr. Co.* v. *United States*, 197 Ct. Cl. 164, 455 F.2d 527 (1972); and *Dynamics Corp. of America* v. *United States*, 182 Ct. Cl. 62, 389 F.2d 424 (1968).

Plaintiff says that Article I:9 is ambiguous and should be construed against the government. We conclude that it is unambiguous and there is no requirement that it be construed against the government. *See ITT Arctic Services, Inc.* v. *United States, supra.*

Plaintiff argues further that the "custom of the trade" should have been considered in interpreting the contract. It is well settled that when the terms of a contract are clear and unambiguous, there is no need to resort to the custom of the trade for its interpretation. Furthermore, there was no evidence as to the custom of the trade, except that relating to custom in 1972, and thereafter, after plaintiff's contract had expired and escalation provisions had been inserted in follow-on contracts.

We hold that the Board properly construed the contract provisions and that its decision was not arbitrary nor capricious and was supported by substantial evidence and is entitled to finality and it is hereby affirmed.

Accordingly, plaintiff's motion for summary judgment is denied, the cross-motion for summary judgment of defendant is granted, and plaintiff's petition is dismissed.

APPENDIX B

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of –	)	
Sea-Land Service, Inc.	)	
Under Contract	)	ASBCA No. 16218
No. N0003371CA1464	)	

APPEARANCES FOR THE APPELLANT:
Ragan & Mason
By: Gerald A. Malia, Esq.
Washington, D.C.

APPEARANCES FOR THE GOVERNMENT:
Dudley J. Clapp, Jr., Esq.
Counsel, Military Sealift Command
Milton J. Stickles, Jr., Esq.
Deputy Counsel
E. Duncan Hamner, Jr., Esq.
Assistant Counsel

OPINION BY MR. THOMPSON

The appeal was taken 24 March 1971 from a decision of the contracting officer, Military Sealift Command, denying appellant's claim for a bunker fuel surcharge under a special clause, Article I:9(b), of the basic terms of agreement covering the carriage of Government cargo in containers. The parties have waived oral hearing and submitted the appeal under Rules 11 and 13 for a decision by the Board on the record on the

understanding that the decision be limited to entitlement, and that in the event of a decision in appellant's favor the question of the amount of recovery will be remanded to the parties for negotiation, etc. The Board has received briefs in the nature of pre-hearing briefs and reply briefs from the parties.

FINDINGS OF FACT

Contract Provisions. The container agreement bearing the number appearing in the heading and termed "CONTAINER AGREEMENT (Common Carriage)" was executed by appellant and respondent's predecessor, Military Sea Transportation Service, on 1 June 1970. The bulk of the operative provisions were incorporated by reference. The document executed 1 June 1970 stated in pertinent part:

"* * *

"The following parts of the MSTS CONTAINER AGREEMENT AND RATE GUIDE (P-27) are incorporated in this Agreement by this reference as fully as if set forth herein: the CONTAINER AGREEMENT and the rates identified as the Carrier's freight rates, together with all other provisions of the SCHEDULE OF RATES applicable with those rates.

"This Agreement is a continuing tender of ocean transportation service. It shall be effective with respect to a particular route upon the effective date or dates of the rates for that route and it shall remain in force until terminated. The Agreement may be terminated by either party as to any route at any time after one year from the effective date of the rates for that route by giving

written notice to the other party of not less than sixty (60) days prior to the effective date of such termination. . . . Termination of this Agreement shall not affect any Shipping Order issued and accepted prior to the effective date of the termination.

"Upon the effective date of this Agreement for rates on a route included within this Agreement, any previously existing Container Agreement, Shipping Agreement or Shipping Contract between the parties shall terminate insofar as that route is concerned upon accomplishment of all outstanding Shipping Orders under such Container Agreement, Shipping Agreement or Shipping Contract on that route.

"This Agreement is negotiated pursuant to the authority of 10 U.S.C. 2304(a)(17) and 49 U.S.C. 65.

* * *"

(Rule 4 Doc. 2)

The P-27 agreement referred to in the above quoted "CONTAINER AGREEMENT (Common Carriage)" was a bulky document called "MSTS Container Agreement and Rate Guide" entered into by MSTS and fifteen ocean carriers, including appellant among the others, effective 1 July 1970. (Rule 4 Doc. 1)

P-27 set forth "basic terms of agreement" for "carriage of cargo under MSTS Container Agreement (Common Carriage)," followed by schedules of various rates for cargo, etc., which were described in general language in the "basic terms".

The "basic terms" consisted of Parts I, II and III.

Part I of the "basic terms" was entitled "Conditions of Service," of which the following portions are pertinent (with emphasis added):

"* * *

"ARTICLE I:1 *DESCRIPTION OF SERVICES*

The Carrier represents that he is a common carrier by water within the meaning of the Shipping Act of 1916, as amended; that he operates or will inaugurate by the date stated in the STATEMENT OF RATES an established berth service on the trade routes for which rates are quoted in the SCHEDULE OF RATES, and that he maintains on such routes regularly scheduled sailings of United States flag vessels. The Carrier further represents that he offers container service on the above designated routes to the public for the carriage of commodities having the general shipping characteristics of those for which service may be performed under this Agreement. . . . The term 'Container Service' as used in this Agreement means the movement of cargo in Carrier or Government-furnished containers and the transportation of Government containers, on regularly scheduled vessel sailings for the general public at duly published rates, terms and conditions. In carrying cargoes for the Government in containers in any of his scheduled vessels as provided in this Agreement, the Carrier shall carry as a common carrier.

"ARTICLE I:2 *TERMS OF CONTRACTUAL RELATIONSHIP*

(a) The purpose of this Agreement is to establish the terms under which the Carrier offers to accomplish the transportation in containers of such lawful cargo . . . as may be tendered from time to time by the Government for carriage under the Agreement. When transportation services are ordered under this Agreement, a Shipping Order substantially in the form attached hereto as Appendix A . . . will be issued by the Government.

The Government will also prepare all necessary papers including vessel papers or manifests listing the cargo stowed in containers aboard the vessel and such will be receipted for by the Carrier or his agent. Such papers, including vessel papers or manifests, shall be evidence of ownership and together with the Shipping Order constitute the contract of carriage, and all the terms of this Agreement shall be deemed as incorporated therein as part thereof. . . .

* * *

(e) Nothing in this Agreement shall be construed as restricting competition in any manner or as precluding the Government from obtaining transportation from the Carrier on the routes covered herein under the published tariffs of the Carrier that are available to the public, provided goods to be so carried shall be tendered in accordance with the terms and conditions of those tariffs and for carriage under a standard form of Government Bill of Lading. . . .

"ARTICLE I:3 *COMPENSATION*

Compensation for carriage of goods under this Agreement shall be in accordance with the SCHEDULE OF RATES. . . .

* * *

"ARTICLE I:5 *SCOPE OF SERVICE*

(a) The Carrier shall furnish the following services for which rates are published in the SCHEDULE OF RATES.

(i) BASIC SERVICE: *The Carrier's basic service for which he shall be paid at the basic rates set forth in the SCHEDULE OF RATES* shall consist of furnishing a clean empty container on a trailer to the Government at his terminal; receiving and handling the stuffed container at his loading terminal; loading and *transporting the container in*

his vessel; discharging and handling the container at his receiving terminal; furnishing the container on a trailer; and paying all port charges occurring against the container and its contents except charges measured by the volume, weight or value of the cargo.

(ii) DRAYAGE SERVICE: The Carrier's drayage service for which he will be paid at the drayage rates set forth in the SCHEDULE OF RATES. . . .

(iii) STOP-OFF SERVICE: The Carrier's stop-off service for which he shall be paid at the stop-off rates set forth in the SCHEDULE OF RATES. . . .

(iv) STUFFING SERVICE: The Carrier's stuffing service for which he shall be paid at the stuffing rates set forth in the SCHEDULE OF RATES. . . .

(v) TEMPERATURE RECORDING SERVICE: The Carrier's temperature recording service for which he shall be paid at the temperature recorder rate set forth in the SCHEDULE OF RATES shall consist of furnishing a continuous temperature recording instrument in each refrigerated container when so requested by the Contracting Officer at the time the container is ordered. . . .

(vi) SUPERCARGO TRANSPORTATION SERVICE: The Carrier's supercargo transportation service for which he shall be paid at the supercargo transportation rate set forth in the SCHEDULE OF RATES. . . .

(b) Freight shall be computed for each container and shall consist of the sum of all payments due for each of the above services actually furnished in accordance with the orders of the Contracting Officer as set forth in the Shipping Order.

"ARTICLE I:6 *GENERAL CONDITIONS OF SERVICE* . . . . [This article contained detailed provisions covering miscellaneous activities such as notice to spot, pick up, and remove containers, the use of trailers for moving containers during stuffing, avoidance of areas unsafe for tractors and trailers, delivery of containers at point of discharge, provision of information regarding each container, notice of impending arrival of the vessel, and maintenance of refrigeration for refrigerated containers.]

* * *

"ARTICLE I:8 *PORT CHARGES*

The Carrier shall pay all port charges, canal tolls and similar charges (properly for the account of the vessel) including such charges assessed at Government installations.

"ARTICLE I:9 *SCHEDULE OF COST RESPONSIBILITIES*

(a) As a means of facilitating the administration of this Agreement, the parties have agreed that certain specific items of cost anticipated as likely to arise in the performance of their respective duties under Articles I:5, I:6 and I:8 shall be listed, and the cost responsibilities of the parties indicated, in a schedule attached hereto as Appendix B . . . and made a part of this Agreement. *Determinations of responsibility for specific items of cost agreed to by the parties under this Article are to be consistent with the general language of Articles I:5, I:6 and I:8;* provided, however, in the event of conflict, the specific language of Appendix B shall prevail.

(b) *Either party may nominate changes to or additional items of cost and cost responsibility to be incorporated into Appendix B.* Such nominating party shall serve upon the other party a written

nomination, *together with a detailed statement of all pertinent facts and appropriate supporting data necessary for a determination of the cost responsibility under Articles I:5, I:6 and I:8.* If the other party agrees in writing to the nomination, such nomination will be incorporated into Appendix B as of the agreed effective date. Failure of the other party to agree to the nomination within a period of thirty (30) days from its receipt, or within a mutually agreeable greater period, shall constitute a dispute concerning a question of fact within the meaning of that term in the Article entitled 'Disputes' in Part III of this Agreement.

* * *

"ARTICLE I:19 *SCHEDULE OF RATES*

(a) The SCHEDULE OF RATES is a part of the MSTS Container Agreement. It consists of SECTION I, STATEMENT OF BASIC RATES; SECTION II, STATEMENT OF DRAYAGE RATES; SECTION III, STATEMENT OF MISCELLANEOUS RATES; AND SECTION IV, STATEMENT OF RATES FOR CARRIAGE OF GOVERNMENT CONTAINERS.

(b) SECTION I consists of a separate Statement of Basic Rates for each route for which the parties have negotiated rates. . . .

(c) SECTION II consists of a Statement of Drayage Rates, and the rates stated therein shall apply when the Carrier is ordered to dray a container between his terminal where the container is loaded on or discharged from his ship and another place. . . .

(d) SECTION III consists of Statement of Stuffing Rates, Stop-off Rates, Demurrage Rates (Charges for Container Detention) and other Miscellaneous Rates.

(e) SECTION IV consists of a Statement of Rates for Carriage of Government-Owned or Leased Containers and the rates, terms and conditions stated therein shall apply to services furnished by the Carrier in connection with containers, other than Carrier-owned containers, which are offered by the Government for shipment.

"ARTICLE I:20 *ADDITIONS AND REVISIONS*

(a) Except during the one year period for which the parties have agreed that rates stated in SECTION I, SECTION II, SECTION III and SECTION IV shall remain effective, the SCHEDULE OF RATES may be amended by the parties in the following manner. Either party may propose in writing that all or a portion of the SCHEDULE OF RATES be amended. No later than thirty (30) days from receipt of such proposal the parties shall undertake to negotiate such an amendment and, if agreement is not reached within sixty (60) days from the commencement of such negotiations, the Carrier shall have the option of withdrawing that portion of the SCHEDULE OF RATES which is the subject of the dispute, such withdrawal being effective after thirty (30) days notice in writing to the Government and being subject to the requirements of applicable statutes and of rules and regulations of cognizant Government agencies.

* * *"

(Rule 4 Doc. 1)

It is undisputed that the rates were intended to reflect competition to the maximum extent practicable, in response to the requirements of ASPR 1-300.1 and 1-302.2, and that this had been accomplished by prior issuance of a request for proposals, RFP 500, on 13 February 1970, to the ocean shipping industry (Rule 4

Doc. 1; MSC Ans., par. 1(1), pp. 3-5, to App. Interrog. 6; Affidavit J. Scott Morrison attached to App. Brief). Other containership operators executed container agreements under RFP 500 having the same basic terms and conditions as appellant's agreement.

Appendix B to Part I, referred to in Article I:9, set forth above, contained the following pertinent matter (with emphasis added):

"**APPENDIX B**

"SPECIFIC ITEMS OF COST IN CONNECTION WITH PERFORMANCE UNDER ARTICLES I:5, I:6 AND I:8 AND AGREED DETERMINATION OF COST RESPONSIBILITY AS BETWEEN THE PARTIES

"1. *Responsibility of the Carrier*

The Carrier is responsible for the cost of the following services:

a. Furnishing and maintaining containers and trailers except when trailers are waived or containers or trailers are furnished by the Government

b. Drayage (when ordered) . . . .

c. *Port charges and other expenses applicable to the Carrier's vessel:*

(1) Pilotage

(2) Tug hire

(3) Line handling

(4) Utilities and other services required by the vessel

(5) Dues (including harbor and quay dues), fees (including light-house fees) and/or taxes assessed against the vessel

(6) Dockage (or side wharfage), berthage, sheddage, wharfage (or top wharfage)

(7) Agency fees

(8) Canal transit tolls

(9) Customs

(10) All charges in connection with vessel entrance and clearance

(11) Special fire or security watch required as a condition to stay in port

(12) Terminal service and facilities charges at commercial piers

(13) *Other costs in connection with operation of the ship*

d. Container terminal and stevedoring costs . . . .

e. Taxes, dues, fees and other charges (including storage charges) levied by governments, ports authorities, or wharfingers on the containers and on their contents, if any, except those charges which are payable by the Government under item 2c(3)

f. Stuffing and unstuffing charges listed under items 2b(1), (2) and (4) when ordered by the Government plus costs of receiving cargo at tailgate and delivering cargo to tailgate at Carrier's terminals

g. Furnishing container and cargo data within 4 hours after departure of ship from each loading port

h. Furnishing ship arrival notice 48 hours prior to arrival at each discharge port

"2. *Responsibility of the Government*

a. Respot of container within a Government facility, supply point or vendor's plant

b. Stuffing and unstuffing (except when ordered from the Carrier):

(1) Labor employed

(2) Packing material and/or dunnage employed in stuffing the container

(3) Preparing documentation

(4) Sealing the container

(5) All costs of delivery of noncontainerized cargo to the Carrier's terminal where the Carrier performs receipt and stuffing operations; and receiving cargo at tailgate when the Carrier performs unstuffing operations

c. Miscellaneous dues, fees and charges

(1) Cargo surveyor fees when services are ordered by the Government

(2) Cargo surveyor fees resulting from dispute between the Government and the Carrier when resolved in the favor of the Carrier

(3) (i) Customs, and other fees, dues and/or taxes chargeable to cargo when measured by the volume, weight or value of the cargo

(ii) Any portion of the taxes, dues, fees and other charges on containers and their contents

(that are the Carrier's responsibility under item 1e) incurred as a result of the Carrier delying the commencement of drayage at the request of the Contracting Officer

(4) Panama Canal Company handling and transfer charges, actual or constructive assessed under the Canal Zone Government official tariffs

(5) Drayage charges listed under 1b when performed by Government"

(Rule 4 Doc. 1)

Part II of the "basic terms" contained standard maritime clauses, not presently pertinent. (Rule 4 Doc. 1)

Part III consisted of standard Government clauses, of which only the Disputes clause, in usual form, is presently pertinent. (Rule 4 Doc. 1)

Development of Negotiated Competitive Procurement. The method of negotiated competitive procurement employed in the present instance reflected a change in practice which began in 1966. MSC's description of the background and the new system has not been disputed and is substantially as follows:

Prior to 1966 the Military Sea Transportation Service had procured ocean berth service, provided by carriers operating regularly-scheduled vessels on specific routes as common carriers, on the basis of a cargo allocation system under which all eligible carriers were allocated or guaranteed a certain amount of cargo. Each carrier executed a document called a "Shipping Contract" with the Government which set out the respective rights and

duties of the parties. In 1966 Department of Defense policy regarding ocean transportation procurement was changed to require negotiated competitive procurement. Under this new system all carriers are given the opportunity to submit rates on various specified routes. Cargo is then offered to the carrier who has submitted the lowest rate for any given route. If the lowest rate carrier cannot or will not carry any or all of the cargo offered for a particular booking, the remaining cargo is then offered to the next lowest bidding carrier. This process continues in an ascending bid order until all cargo has been booked. Under this system no carrier is guaranteed any cargo for carriage. The system was later applied to the recently-developed containership operations, employing a form of contract adapted to the peculiarities of container transportation (as in the present instance). (MSC Brief)

The described system of negotiated procurement has been approved by the Federal Maritime Commission in 10 FMC 69 (1966), and on a petition for review of that decision has survived attack under sections 14 Fourth, 14b and the first paragraph of section 16 of the Shipping Act 1916, as amended, 46 USC 812, 813a and 815, in *American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commission, et. al.*, 380 F2d 609 (CA-DC-1967). Section 14b had been added to the Shipping Act in 1961 to restore and regulate "dual rate" contracts after the decision of the United States Supreme Court in *Federal Maritime Board v. Isbrandtsen Company, Inc.*, 356 U.S. 481, 2 L. Ed. 2d 926 (1958), which had held that section 14 Third[1] of the

[1] Retaliating against a shipper by refusing available space or resorting to other discrin.inating or unfair methods because the shipper has patronized any other carrier.

Shipping Act, 46 USC 812 outlawed "dual rate" contracts sponsored by conferences of carriers wherein lower rates for the shipper were tied to an agreement for exclusive carriage, although the Supreme Court recognized that contracts in the nature of "requirements" contracts were not within the prohibited class. In the case involving 10 FMC 69, the U.S. Court of Appeals for the District of Columbia Circuit held that the negotiated competitive procurements are not "dual rate" contracts under section 14b, or in violation of section 14 Fourth[2] or the first paragraph[3] of section 16 of the Act.

Claim Events. Shipping orders under appellant's container agreement were apparently issued and executed from time to time between 1 June 1970 and 1 January 1971 without any questions being raised about the cost of bunker fuel. On the latter date, however, appellant advised MSC by telegram that there had been a drastic increase in the cost of bunker fuel, world-wide, which had not been anticipated during formulation of rates under existing container and shipping agreements; that the increase had been about $1.70 per barrel over the prices in effect on 1 January 1970 and was likely to increase by another $0.50 per barrel by the spring of 1971. Appellant requested that consideration be given to establishment of a temporary bunker fuel surcharge on an industry-wide basis for the balance of the existing contract periods. (Rule 4 Doc. 3) The reply of MSC on 4 January 1971 was to the

[2] Discrimination based on volume.

[3] Unjust or unfair devices of shippers to obtain transportation at rates lower than would otherwise be applicable.

effect that there was no contract provision for such a surcharge and that there was on authority for it otherwise except as might be appropriate under Public Law 85-804 and ASPR 17. (Rule 4 Doc. 4)

Thereafter by letter dated 18 January 1971 to MSC appellant stated that under Article I:9(b) it nominated a bunker fuel charge of $2.00 per measurement ton of cargo, to be effective within thirty days of receipt of the letter, as an additional item of cost or change in paragraph 1c of Appendix B, in this connection stating the following among other things:

"* * *

"Article I:9(a) refers to costs 'anticipated as likely to arise' and refers to Article I:5, I:6 and I:8. Article I:9(b) covers 'changes' or 'additional' items of costs. Article I:5(a)(i) covers the basic service involved; i.e., 'transporting the container in his vessel . . .' Article I:8 covers port charges, canal tolls and 'similar charges (properly for the account of the vessel) . . .' The bunker surcharge is clearly within Article I:5 and possibly within Article I:8 as well. It is therefore a change or an 'additional' item of cost within Article I:9 which should be incorporated into Appendix B.

"Appendix B now provides that:

'Other costs in connection with the operation of the Ship'

are costs for which the Carrier is responsible. [I(c)(13)]. Our nomination is that an additional item entitled 'Bunker surcharge of $2.00 per measurement ton' be incorporated as Item C(6) on page 34. Alternatively, the bunker surcharge could be considered a 'change' in paragraph I(c)(13) and transferred to an item under 'C' on page 34 as a miscellaneous charge.

* * *"

(Rule 4 Doc. 5)

The contracting officer's reply by letter dated 26 January 1971 read in pertinent part as follows:

"* * *

"Your proposed item is not considered proper because it is inconsistent with Articles I:5, I:6 and I:8. The purpose of Appendix B, as is apparent from Article I:9(a), is to specify particular items of responsibility that fall under the more generally stated obligations of the parties in Articles I:5, I:6 and I:8. As you acknowledged in your letter, Article I:5 requires the Carrier to transport the containerized cargo in his ship for which he is entitled solely to freight computed from the appropriate rates in the Schedule of Rates. A specific item to this effect is now found in paragraph 1c(13) of Appendix B. Thus, all of the costs of bunkers are clearly payable by the Carrier and it would be inconsistent to add an item placing a part of that cost on the Government.

"The action you request would also constitute an increase in the price of your services, for which no consideration will flow to the Government. You were earlier informed that this could not be done except under the authority of Public Law 85-804 and its implementing regulations in Section XVII of the Armed Services Procurement Regulation.

* * *"

(Rule 4 Doc. 6)

Appellant having subsequently, on 2 February 1971, requested a final decision under the Disputes clause, the contracting officer on 16 March 1971 rendered the final decision rejecting the claim from which the present timely appeal was taken. The final decision stated among other things:

"* * *

". . . . It is clear that Sea-Land is compensated for the service that it renders to the Government on the basis of rates that it has proposed to the Government and which are set forth in the SCHEDULE OF RATES. . . . By the terms of Article I:5(a)(i) . . . part of the basic service which Sea-Land is obligated to provide to the Government is the transportation of the container in its vessel. Pursuant to Article I:9(a) the parties have agreed to set out in Appendix B of the Agreement specific items whose cost responsibility is placed on Sea-Land or the Government. These items are to be consistent with the general language of Article I:5 among others. In addition to specific items of cost responsibility for Sea-Land's account set out in paragraph 1(c) (1)-(12), paragraph 1(c)(13) of Appendix B states that 'other costs in connection with operation of the ship' are to be for Sea-Land's account. In the alternative, paragraph 2 of Appenix B which sets out the cost responsibilities chargeable to the Government's account makes no mention of bunker surcharges. Consequently, it is apparent that the determination of cost responsibility for bunker charges is consistent with the general language of Article I:5(a)(i) which obligates Sea-Land to transport the container in its vessel. Your request for a bunker surcharge must be rejected because it is inconsistent with the general language of Article I:5(a)(i).

* * *"

(Rule 4 Doc. 7, 9)

Additional Circumstances. The period of time covered by the present claim is from approximately 4 January 1971 to 30 June 1971. As of the latter date the parties by agreement terminated the instant container agreement by entering into a new container

agreement beginning 1 July 1971, the result of a new request for proposals, RFP 600. Pursuant to the new RFP the new agreement expressly included an allowance per measurement ton of cargo for increases in bunker fuel prices, together with a credit to the Government in the case of a decrease, under a formula devised by MSC accompanied by a revision of Part 1 of the basic terms of agreement providing that the carrier warranted that the rates set forth in the schedule of rates contained no element for the contingency of increases in bunker fuel prices, and that such rates reflected bunker fuel prices as of 16 April 1971. (Minutes, Prehearing Conference, 7 June 1971, par. 3 and 4; Minutes, Prehearing Conference, 7 July 1971, par. 7; MSC Ans., par. 1(1), pp. 3-5, to App. Interrog. 6; App. Brief, Ex. A)

It is undisputed that under Article I:5(a) and Appendix B of the basic terms of agreement as entered into, the cost of bunker fuel was not a responsibility of the Government. It is also undisputed that appellant did not decline to execute any shipping orders under the instant container agreement on the ground that it was not bound. So far as appears, appellant executed all shipping orders it received while continuously claiming the surcharge from January 1971 onward, relying then and now entirely on the claimed right to nominate a surcharge under Article I:9(b).

MSC has not issued any interpretation inconsistent with that expressed by the contracting officer in connection with the present claim. MSC has denied comparable claims by other ocean carriers for a bunker fuel surcharge under Article I:9(b). (MSC Ans., par. 1 and 2, to App. Interrog. 6 and 11). We have examined

transcripts furnished by MSC of what was said at meetings between MSTS and ocean carrier representatives at the time the first negotiated competitive procurements were begun in 1966 (RFP 100 and RFP 102), as well as a copy of a commentary by MSTS on a draft of the "basic terms of agreement," furnished by appellant, but have found nothing in either which would support appellant's view that freight rates can be escalated under Article I:9(b) to reflect increased costs of bunker fuel. (Rule 4 Doc. 12, 13; App. Reply to MSC Request for Admissions, Attach. 2)

Proceedings Before Federal Maritime Commission. Since the parties have devoted considerable attention to certain proceedings arising in the Commission in 1971 after the present contract was entered into, and involving this and other similar contracts and the surcharging of the increased cost of bunker fuel, we deem it appropriate to note the general substance of the proceedings and the result, although these circumstances have no bearing on the meaning of the contract as entered into in 1970.

On 23 February 1971 the Commission ordered a number of ocean carriers, among them, Sea-Land Service, Inc., the present appellant, to show cause why their failure to impose a bunker fuel surcharge on military cargo carried under MSC's competitive procurement system was not in violation of sections 14 Fourth, 16 First, and 17 of the Shipping Act, 1916, as amended, in view of the fact that they had imposed such a surcharge on all commercial cargo carried. The report and opinion of the Commission, rendered 14 January 1972, Docket No. 71-17, on the replies of the parties without an evidentiary hearing, after dismissing

the proceeding as to three carriers no longer in the trade involved, held that Sea-Land Service, Inc., having "imposed" the surcharge on MSC and pursued its remedy under the Disputes clause of the contract, was no longer in violation of any of the sections of the Shipping Act enumerated above, and held that the remainder of the responding carriers were not in violation of section 14 Fourth (unfair or unjust discrimination based on volume) but were in violation of section 16 First (undue and unreasonable preference or advantage) and section 17 (unjust discrimination between shippers). One of the Commissioners dissented, basically on the ground that the majority erred as a matter of law, (1) in holding the surcharge must be imposed on military cargo if imposed on commercial cargo, in the face of the well-established rule, previously recognized by the Commission, that the United States may lawfully be granted reduced rate transportation, and (2) because it disregarded, or was attempting to rewrite, the terms of the carriers' contracts with MSC. He also noted that the record did not establish the fact of preference or prejudice in treatment as to the bunker fuel surcharge. The resulting order of the Commission to the remaining carriers was to cease and desist from further violations of sections 16 First and 17 of the Shipping Act, 1916. (Rule 4 Doc. 14)

The Commission having denied a petition for reconsideration on 1 May 1972, certain of the affected carriers, other than Sea-Land Service, Inc., have filed petitions for review of the Commission's order, one group in the U.S. Court of Appeals, Second Circuit and another in the U.S. Court of Appeals, Ninth Circuit. The Board is not advised as to the present status of the

proceedings on the petitions for review. (Rule 4 Doc. 15, 16, 17)

It appears from the decision of the Commission that there was pending before the Commission at the time a further proceeding entitled "Investigation of Competitive Procurement Practices on Military Cargo", Docket No. 71-35, begun 7 April 1971. The Board is not advised as to any developments in Docket No. 71-35.

Contentions of the Parties on Appeal. The contentions of the parties on appeal are essentially the same as the views exchanged between them in the quoted correspondence concerning the claim.

DECISION

Meaning of Contract Provisions. The dispute ultimately concerns the meaning of Article I:9(b) of the "basic terms of agreement," viewed in the context of Article I:9(a), Appendix B, and the other related provisions, such as Articles I:3, I:5(a)(i) and (b), and I:20(a).

We are unable to entertain the view advanced by appellant that Article I:9(b) provides a means for escalating freight rates to compensate for the increased cost of bunker fuel as measured by the claimed surcharge or otherwise.

Appellant's claim tacitly assumes that the cost items in Appendix B had a dollar value at the outset, and that consequently, when a higher dollar cost is actually experienced for an item present in Appendix B as a carrier responsibility, the increase can be nominated by the carrier as a "change to" or "additional item of cost" under Article I:9(b).

Such is not the case. Appendix B describes costs only by nature, kind, or character without regard to any dollar amount and without any warranty against inclusion of contingency factors in rates. Contrary to appellant's assumption, the contract in truth is cast in terms which provide that the risk of dollar increases in costs of the items of cost assigned to the carrier shall be covered by the stipulated rates. Article I:5(a)(i) makes transportation of the container, along with the handling etc., the basic service for which rates are to be paid. Transportation at a given rate is, therefore, central to the principal apparent purpose of the contract; and Article I:3 makes the rates the compensation to be paid. Appendix B 1c(13) makes costs in connection with the operation of the vessel (in addition to those expressly mentioned in Appendix B 1c(1) through (12)) part of the cost responsibility of the carrier. There is no contention or evidence of the existence of any applicable usage which by implication would exclude the cost of fuel from the cost of operation of the vessel under this type of berth service contract in the absence of an express exclusion, and appellant necessarily concedes that the cost of fuel was not excluded here. Moreover, under Article I:20(a) the rates are intended to continue unchanged for a year.

Thus the entire thrust of the relevant contract provisions, particularly Article I:5(a)(i) and Appendix B 1c(13), is to place the risk of increases in bunker fuel costs (and the benefit of any decline) on the carrier. In making a nomination under Article I:9(b) a party is required to demonstrate consistency with Article I:5(a)(i). Nomination of the added dollar cost of fuel is neither the nomination of a change to an existing item

nor the nomination of an additional item, is inconsistent with Article I:5(a)(i), and would frustrate the principal apparent purpose of the contract.

Conclusion. In our opinion, the contract, interpreted in accordance with the usual canons of interpretation, unambiguously excludes entitlement to recovery, under Article I:9(b) of the "basic terms of agreement," of the increased cost of bunker fuel by surcharge or otherwise. See *Restatement, Contracts (1932),* see 230, 235, 236 (a), (b). Accordingly, the appeal is denied.

Dated 28 July 1972.

/s/ Beverly Tucker Thompson
BEVERLY TUCKER THOMPSON
Member of Division No. 2
Armed Services Board of Contract Appeals

(Signatures Continued)

I concur

/s/ Alan M. Spector
ALAN M. SPECTOR
Member of Division No. 2
Armed Services Board of
Contract Appeals

I concur

/s/ James W. Booth
JAMES W. BOOTH
Member of Division No. 2
Armed Services Board of
Contract Appeals

I concur

/s/ Richard C. Solibakke
RICHARD C. SOLIBAKKE, Chairman,
Armed Services Board of
Contract Appeals and Member
of Division No. 2

I concur

/s/ Joel P. Shedd
JOEL P. SHEDD, Vice Chairma
Armed Services Board of
Contract Appeals and Member
of Division No. 2

I certify that the foregoing is a true copy of the decision and opinion by the Armed Services Board of Contract Appeals in ASBCA No. 16218, Appeal of Sea-Land Service, Inc., rendered in conformance with the Board's Charter.

Dated 4 August 1972

/s/ George L. Hawkes
GEORGE L. HAWKES, Recorder
Armed Services Board of
Contract Appeals

APPENDIX C

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of – Sea-Land Service, Inc. Under Contract No. N0003371CA1464	ASBCA No. 16218 (Reinstated)

APPEARANCES FOR THE APPELLANT:
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APPEARANCES FOR THE GOVERNMENT:
Vincent A. Cinquina, Esq.
Director, Navy Contract Appeals Division

Trial Counsel:
John L. DeGurse, Jr., Esq.
Military Sealift Command

OPINION BY ADMINISTRATIVE JUDGE ANDREWS

PROCEDURAL HISTORY

The appeal has been reinstated pursuant to a remand order of the Court of *Sea-Land Service, Inc. v. United States*, No. 331-72, United States Court of Claims, directing the Board "to determine whether the drastic

increase in the cost of bunker fuel, on which plaintiff predicates this claim, was foreseen by plaintiff when it entered into the contract on July 1, 1970" (See Finding 1, below), or "was reasonably foreseeable at that time as likely to arise during the contract period. . . ." Those were matters which had not been litigated in the first instance by the parties before the Board. The parties had waived an evidentiary hearing and had submitted the appeal for decision by the Board on the then existing record and briefs. *Sea-Land Service, Inc.*, ASBCA No. 16218, 72-2 BCA par. 9605.

On the appeal it had appeared that appellant contracted to provide container service by its vessels on specific routes at specific freight rates per measurement ton of cargo. Article I:9(a) of the contract states that the parties agree that "certain specific items of cost anticipated as likely to arise" shall be listed, and the cost responsibilities of the parties indicated, in a schedule attached to the contract as Appendix B and made a part of the contract. Appendix B lists, among other things, items of cost designated as within the responsibility of the carrier, among them, sub-items listed under the heading "Port charges and other expenses applicable to the carrier's vessel" consisting of twelve items whose specific nature is stated, e.g., "pilotage," and a thirteenth sub-item defined as "other costs in connection with operation of the ship." Article I"9(b) goes on to say that either party "may nominate changes to or additional items of cost and cost responsibility to be incorporated into Appendix B," and that failure of the other party to agree thereto, within a time specified, shall constitute a dispute concerning a question of fact under the disputes clause of the

contract. Appellant has conceded that the thirteenth sub-item under port charges, etc., covers the ship's fuel but has nominated the increase cost of bunker fuel, beyond what appellant anticipated, as a change to or additional item of cost. Appendix B does not assign any dollar value to any of the items of cost. (R4, Docs. 1, 2)

The specific relief demanded by appellant is not a change in freight rates *per se* but rather the allowance of a surcharge of $2.00 per measurement ton of cargo carried. The Board is not advised as to how appellant has arrived at the figure of $2.00 claimed.

After remand the Board held an evidentiary hearing on the questions remanded. Testimony on behalf of each party was received as well as a substantial number of documents which had not previously formed a part of the record. Thereafter, the parties filed initial briefs and reply briefs.[1]

POSITIONS OF THE PARTIES

Appellant's position is in essence that appellant based its fuel cost estimate on a range around $2.00 per barrel that appellant had paid for bunker fuel previously, and on cost estimates made in the last quarter of 1969; and that appellant did not foresee and had no reason to foresee any substantial increase in the cost of bunker fuel, and included no contingency factor

[1] Rule 4 documents are designated herein "R4, Doc 1" *et seq.* while exhibits received at the hearing on remand on behalf of appellant are designated as "Exh. A-1" *et seq.*, and those on behalf of the Government as "G-1" *et seq.*

in its bid to cover possible increases in the cost of such fuel. The Government's position is that the bunker fuel, termed "Bunker C," is simply another name for fuel oil No. 6, a residual fuel oil sometimes described as heavy oil from the "bottom half of the barrel," and, on the basis of various circumstances relating to the price of residual fuel oil, including Bunker C, the increase in fuel cost could reasonably have been and was foreseen by appellant.

The parties differ as to the last date after which appellant could not have increased the freight rates which appellant originally bid, appellant contending for the date appellant filed its proposal and the Government contending for a later date because of changes in the Government's request for proposals.

SUBSIDIARY FINDINGS OF FACT

1. *Contract and Claim Periods.* Although the contract was executed by the parties 1 June 1970, the specified performance period was 1 July 1970 through 30 June 1971, and the period for which relief is claimed is the period of approximately 4 January 1971 through 30 June 1971. By bilateral agreements the parties amended the contract on 17 August 1970, 23 September 1970, and 31 December 1970. There is no evidence that the amendments mentioned or were related to the cost of bunker fuel. (R4, Docs. 1, 2)

2. *Last Date for Foreseeability – Government's Request for Proposals and Supplements.* The present negotiated competitive procurement began with the issuance by the Military Sea Transportation Service

(predecessor of the Military Sealift Command) on 13 February 1970 of a request for proposals, RFP 500. (Exh. G-20)

3. RFP 500 invited proposals for furnishing ocean transportation on shipping orders on thirty-six different routes in the period 1 July 1970 through 30 June 1971 on a common carriage basis in less than ship load lots, by American flag ships which would provide berth service by commodity category either by break-bulk ships or by container ships supplying carrier-furnished containers. The contracting officer had found that formal advertising therefor was impracticable and that negotiation was authorized. (Exh. G-20)

4. By paragraph 6 of the RFP, proposals were called for on or before 1630 hours EDST 3 April 1970 and were to remain firm until 1630 hours EDST 15 June 1970. (Exh. G-20)

5. Paragraph 9 of the RFP included the following among other matter:

> "d. Notice is given that award may be made without discussion of offers received; therefore, offers should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government.
>
> "e. Upon receipt and evaluation of offers, the Contracting Officer may determine that negotiations would be in the best interest of the Government with respect to one or more rates submitted by a carrier. In that event negotiations will be conducted with all offerors for the rates involved. The need for such negotiations will be determined by the facts in each case. Discussions with an offeror for the purpose of clarifying his offer or obtaining supporting information with

which to evaluate the offer shall not be considered negotiations within the meaning of this paragraph so long as the rates initially offered remain unchanged. If negotiations are conducted, they shall not constitute a rejection or counter offer on the part of the Government.

"f. Shipping Agreements and Container Agreements, as applicable, will be awarded to all responsible carriers who submit offers responsive to this RFP; *provided*, however, that the Contracting Officer reserves the right to reject offers of rates, in whole or as to any one or more individual rates, that are found to be –

(1) so low as to make doubtful the ability of the offeror to provide acceptable service on a continuing basis, provided that before such rejection, the carrier shall have been given a reasonable opportunity to support the conclusion that its rates are compensatory for its proposed service and particular operation or –

(2) so high as to suggest that the offer of service is not made in good faith or that payment of such rates would likely result in charges to the Government exceeding the carrier's charges to the public for like service on the route with respect to cargo moving in significant volume and having similar stowage and care characteristics, provided that before such rejection the carrier shall be permitted a reasonable opportunity to establish the contrary." (Exh. G-20)

6. On the following day, 14 February 1970, MSTS issued Modification No. 1 to RFP 500 making certain changes in the required container service at various ports. This did not alter the date for submission of proposals. However, offerors was required to acknowledge receipt of the modification when submitting a proposal. (Exh. G-20)

7. On 20 February 1970 MSTS issued Modification No. 2 to RFP 500 making a few changes and corrections in the text of the proposed container agreement. This also did not alter the date for submission of proposals, but offers were required to acknowledge receipt of the modification when submitting a proposal. (Exh. G-20)

8. As provided in the original RFP a pre-proposal conference was held on 2 March 1970 for the purpose of responding publicly to inquiries by interested persons. As a result of comments received at the pre-proposal conference of 2 March, and thereafter, MSTS issued Modification No. 3 to RFP 500 on 11 March 1970. This modified various provisions of the proposed container agreement but did not change the date for submission of proposals. However, offerors were required to acknowledge receipt of the modification when submitting a proposal. (Exh. G-20)

9. Because of a delay in obtaining a ruling by the Comptroller General of the United States as to the legality of the practice of using foreign flag feeder lines as an adjunct of container service, MSTS issued Modification No. 4 to RFP 500 on 27 March 1970 permitting carriers to submit alternate offers on a "NO FOREIGN FLAG FEEDER SHIPS" basis and also on a "WITH FOREIGN FLAG FEEDER SHIPS" basis. The modification also eliminated two ports from the proposed container service. (Exh. G-20)

10. Modification No. 4 also amended paragraph 6 of the original RFP so as to change the time limit for submission of proposals to 1630 hours EST 10 April 1970 but still required proposals to remain firm until 1630 hours EDST 15 June 1970. Paragraphs 7 and 8 of this modification provided:

"7. Offerors must acknowledge receipt of this Modification and Modifications 1, 2 and 3, when submitting offers.

"8. If, by virtue of this amendment, it is desired to modify a proposal already submitted, such modification may be made by telegram or letter, provided such telegram or letter makes reference to this Modification No. 4 and is received prior to the closing date." (Exh. G-20)

11. Thereafter, Modification No. 5 to RFP 500 made some changes in Modification No. 4 but did not change the date for submission of proposals. Paragraphs 4 and 5 of Modification No. 5 provided:

"4. Offerors must acknowledge receipt of this Modification and Modifications 1, 2, 3 and 4, when submitting offers.

"5. If, by virtue of this amendment, it is desired to modify a proposal already submitted, such modification may be made by telegram or letter, provided such telegram or letter makes reference to this Modification No. 5 and is received prior to the closing date." (Exh. G-20)

12. Appellant Sea-Land Service, Inc. submitted its proposal to MSTS on 10 April 1970. (Tr. 1-10)

13. By telegraphic message 151647Z, 15 May 1970, the contracting officer, MSTS, advised appellant and all other carriers who had submitted proposals to the following effect: the contracting officer had negotiated with all carriers who had submitted offers of break-bulk and container service; as a result, several carriers had reduced one or more rates that improved their order of rate favorability; in order to insure equitable treatment of all offerors submitting proposals under the RFP offerors were thereby provided an opportunity to

submit adjustments to previously submitted rates for break-bulk service, and rates for container service, on various identified routes "best and final offers" on such rates were to be submitted by 1630 hours EDST 20 May 1970. (Exh. G-21)

14. By further telegraphic message 18425A, 18 May 1970, the contracting officer, MSTS, advised the addressees of message 151647Z as follows:

"1. AS A RESULT OF INQUIRIES RECEIVED, FOLLOWING IS PROVIDED IN AMPLIFICATION OF MY 151647Z MAY 70.
2. IT WAS NOT INTENDED TO PRECLUDE THE SUBMISSION OF MODIFICATION OF RATES ON ROUTES AND CATEGORIES NOT LISTED IN REFERENCED TELEGRAM IF SO DESIRED." (Exh. G-22)

15. We find that 20 May 1970 was the last date upon which appellant could have increased the freight rates which appellant had bid in response to RFP 500.

16. *Nature of Bunker Fuel – Industrial Standard.* The standard specification, D396, for fuel oils published by the American Society for Testing and Materials, as revised in 1969, states, at page 167 (paragraph A1.2.1):

"A1.2 Classes

"A1.2.1 Because of the methods employed in their production, fuel oils fall into two broad classifications: distillates and residuals. The distillates consist of overhead or distilled fractions. The residuals are bottoms remaining from the distillation, or blends of these bottoms with distillates. In Specification D396, Grades No. 1 and No. 2 are distillates and the grades from No. 4 to No. 6 are usually residual, although some heavy distillates may be sold as Grade No. 4."

On the same page the specification states in part:

"A1.3 Grades

* * *

"A1.3.6 *Grade No. 6,* sometimes referred to as 'Bunker C,' is a high-viscosity oil used mostly in commercial and industrial heating. . . ."

Table 1 on page 166 lists detailed requirements for Grade No. 6 respecting flash point, volume percent for water and sediment, and viscosity. (Exh. G-11; Tr. 2-8, 9)

17. *Federal Specification.* Federal specification VV-F-815 B, dated 16 December 1969 covers fuel oil for oil-burning, heat-generating equipment, Section 1.2 describes grades as follows:

"Grade No. 1	– Distillate
Grade No. 2	– Distillate
Grade No. 4	– Light residual or heavy distillate
Grade No. 5 (Light)	– Residual
Grade No. 5 (Heavy)	– Residual
Grade No. 6	– Residual (Bunker C)"

Section 6.1.6 also states in part:

"6.1.6 *Grade No. 6.* A high-viscosity oil, sometimes referred to as 'Bunker C', and used mostly in commercial and industrial heating. . . ."

Table 1 on pages 4 and 5 lists detailed requirements for Grade No. 6 identical with those in Table 1 of ASTM specification D396, except for a difference of one degree in flash point on the centigrade scale (but not on the fahrenheit scale), and a difference of two percentage points in kinematic viscosity at 122° F or 50° C. Both tables state that this viscosity value is for information only and is not limiting. (Exh. G-11, G-12)

18. The Defense Fuel Supply Center, which engages in purchasing on an annual basis, treats the terms "Grade No. 6" and "Bunker C" as describing the same fuel oil, does not consider the specification differences to be significant, knows of no other commonly used specifications for Grade No. 6 or Bunker C, and knows of no other fuel oils having the same or nearly the same specification as Grade No. 6 and Bunker C. (Tr. 2-11-13)

19. Two major oil suppliers who supplied appellant in 1970 have acknowledged that they furnish the same oil in responding to orders for Grade No. 6 or for Bunker C. (Exh. G-8, G-9, G-10; Tr. 2-148-151)

20. On 30 January 1970 appellant's vessel SAN FRANCISCO at Pier Y, Long Beach, California, took on board 8,919.3 barrels of fuel oil invoiced by Phillips Petroleum Company 9 February 1970 as "Fuel Oil 6 Heavy" at $1.80 per barrel before taxes. (Exh. G-5)

21. In ordering fuel appellant always uses the term "Bunker C." (Tr. 1-30, 72-75)

22. A witness for appellant, Mr. Johnson (see Finding 55, below), testified on direct and cross-examination on rebuttal that Bunker C and Grade No. 6 "can be characteristically identical in nature"; that Grade No. 6 is the term generally applied to fuel oil for onshore use, where limitations on sulfur content might apply, so that the basic comparison would be on the basis of Grade No. 6 "N.S.G.", meaning "no sulfur guarantee." On cross-examination he testified that it would be correct to order Bunker C with a specific sulfur content and that the supplier would interpret the order as calling for Grade No. 6 and so invoice it. (Tr. 2-17, 18, 37, 38) Platt's Oilgram Price Service, New

York Edition, for 5 January 1970 refers to Bunker C with a maximum sulfur content of 0.6%. (Exh. G-16)

23. It is undisputed that Bunker C and Grade No. 6 come from what is left after a refiner has removed the lighter component fractions of the original crude oil. Hence, the term "residual." We find that Bunker C and Grade No. 6 are the same residual fuel oil. It is clear, however, from the testimony and various price lists, that prices for on-shore use may be lighter, and the prices for low sulfur oil are higher, than marine bunkers. Low sulfur fuel prices and trends are not indicative of marine fuel prices. Low sulfur oil was not required in appellant's ships. In reading references hereinafter made to the term "residual fuel oil" is should be kept in mind that Grade No. 4 and a part of Grade No. 4 are also residual fuel oils (see Finding 17, above).

24. *Prices of Bunker C, 1956-1969.* A chart received in evidence from appellant indicates the price of Bunker C at New York and Los Angeles rose at the time of the Middle East conflicts of 1956-1957 from about $2.70 per barrel to about $3.30 per barrel, thereafter declining again in 1958 and 1959 to about $2.30 per barrel. After fluctuating upward again to about $2.50 per barrel in the period 1960-1962 it declined again to about $2.20 per barrel, where it remained until the 1967 war. The price then rose again to about $2.50 per barrel. Thereafter by 1969 it declined again to around $2.00 per barrel or less. Prices at English Channel ports, Yokohama, and Hong Kong had different values but the same trend. (Exh. A-14)

25. *Appellant's Actual Costs for Bunker C, 1965-1970.* A tabulation prepared by appellant shows

total cost per barrel for all vendors lumped together in the period as follows:

"1965 – $2.12
1966 – 2.09
1967 – 2.13
1968 – 2.04
1969 – 1.91
1970 – 2.54"

In that six-year period appellant's purchases of Bunker C almost tripled. (Exh. A-11) A further tabulation for 1969 broken down by vendors shows the following:

"VENDOR	NET BARRELS	TOTAL COST PER BARRELL
Esso	798,255	$1.96
Texaco	568,237	2.06
Shell	628,319	1.78
Hess	293,271	1.94
Mobil	196,952	1.83
Gulf	192,385	1.86
Phillips	123,955	1.86
Chevron	214,691	1.87
Mitsui	102,503	1.66
C. Itoh	49,131	1.65
Humble	146,259	2.05
Union	193,922	1.81"

(Exh. G-6)

26. *Further Data Regarding Appellant's Actual Costs for Bunker C, January Through April 1970.* The record does not contain a tabulation by vendors corresponding to the second tabulation in Finding 25. However, the record contains information concerning actual costs from which the following approximate per barrel costs can be derived for three different vendors at three different ports each on various dates in the period:

	"DATE	PRICE PER BARREL
"ROTTER DAM – ESSO	6 Jan	$ 1.60
	10 Jan	1.83
	20 Jan	1.60
	24 Jan	2.43
	3 Feb	1.59
	5 Feb	2.43
	17 Feb	1.59
	17 Feb	1.59
	17 Feb	1.64
	6 Mar	1.90
	16 Mar	1.90
	16 Mar	2.09
	16 Mar	1.90
	26 Mar	1.90
	30 Mar	1.90
	4 Apr	1.90
	18 Apr	1.90
	22 Apr	1.90
	28 Apr	1.97
	30 Apr	2.00
BALBOA, C. Z. – CHEVRON	4 Jan	$ 1.85
	5 Feb	1.95
	27 Feb	1.90
	27 Feb	1.90
	27 Feb	1.90
	16 Mar	2.05
	18 Mar	2.05
	30 Apr	2.05
YOKOHAMA – C. ITOH	1 Jan	$ 1.88
	13 Jan	1.88
	17 Jan	1.90
	6 Feb	1.85
	11 Feb	1.85
	18 Feb	1.88
	19 Mar	1.99
	19 Mar	2.13
	22 Mar	2.28"

(Exh. G-2-1)[2]

27. *Reported Changes in Residual Fuel Oil Prices, September 1969 - 12 May 1970.* The record incorporates the following pertinent information derived variously from PLATT'S OILGRAM, PLATT'S OIL PRICE HANDBOOK AND OILMANAC, PETROLEUM PRESS SERVICE, and PETROLEUM INTELLIGENCE WEEKLY, publications addressed primarily to buyers and sellers of petroleum products:

(a) *September 1969: Gulf Coast* – Low sulfur Bunker C quoted at $1.95 per barrel; regular Bunker C quoted at $1.45 per barrel. (Exh. G-13)

(b) *10 December 1969: Gulf Coast* – Increase of 5¢ per barrel for regular Bunker C reported in recent inter-refinery transaction.

(c) *17 December 1969: Gulf Coast* – Increase of 5¢ per barrel for Bunker C reported on a sale of 40,000 barrels of Bunker C at $1.65 per barrel. (Exh. G-16)

(d) *18 December 1969: Gulf Coast* – Reported price of $1.65 per barrel for regular Bunker C reflects increase of 20¢ per barrel from June - July 1969. (Exh. G-16)

(e) *20 January 1970: Atlantic Coast* – Supplier reported to have increased price of Grade No. 6 to consumers and resellers by 7¢ per barrel in northeast U.S. (Exh. G-16)

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[2] Exh. G-2-1 is an original handwritten document generated by appellant. It was agreed at the hearing that, subject to the approval of the U.S. Court of Claims, this exhibit may be withdrawn by appellant after conclusion of proceedings before the Board and the Court.

(f) *4 February 1970:* Caribbean suppliers reported to have advanced price of Bunker C fuel 3¢ to 9¢ per barrel from range of $1.37 - 1.38 in January 1970. (Exh. G-16)

(g) *6 March 1970:* Estimated prices for Bunker C at U.S. *West Coast* ports reported at an advance of 25¢ per barrel. (San Pedro to Seattle) *Gulf Coast* price for regular residual fuel reported as $1.65 per barrel. (Exh. G-16)

(h) *9 March 1970:* Esso International increases bunker fuel prices 10¢ per barrel at Venezuela, Netherlands Antilles, Trinidad and Kingston, and 15¢ per barrel at ports tributary to Caribbean source (excluding U.S. West Coast). Estimated price per barrel at least $1.46. Humble increases domestic Bunker C prices to $2.30 per barrel at East and Gulf Coast Ports except at Harbor Island, Texas, where new price is $2.40 per barrel.[3] (Exh. G-16)

(i) *15 March 1970:* Canal Zone – Refineria Panama S.A. increases price of Bunker C by 15¢ per barrel. (Exh. G-16)

(j) *23 March 1970: Rotterdam* – Fuel oil quoted at $2.16 per barrel, up 11% since early February. (Exh. A-25) *Gulf Coast* – Regular Grade No. 6 report sold at $1.65 per barrel.

(k) *16 April 1970: Atlantic Coast* – Major supplier raises price of Grade No. 6 10¢ per barrel. (Exh. G-16)

(l) *4 May 1970: Gulf Coast* – Price of regular Bunker C reported to have advanced 15¢

[3] This report is in error. The price increase for East and Gulf Ports was actually 15¢ to $2.15 per barrel. (Exh. G-14 & 16)

per barrel and to be now in a range from $1.90 to $2.00 per barrel. *Atlantic Coast* – Gulf Oil raises price 15¢ per barrel for regular Grade No. 6, 25¢ for low sulphur. (Exh. G-16)

(m) *5 May 1970: Western Hemisphere* – Suppliers to Esso International report advance of 15¢ per barrel for marine fuel at most ports. (Exh. G-16)

(n) *7 May 1970: Eastern Hemisphere* – Esso suppliers report advance of 15¢ per barrel for bunker fuel in all Eastern Hemisphere ports outside Persian Gulf, where increase will be 7.3¢. (Exh. G-16)

(o) *8 May 1970: Canal Zone* – Refineria Panama S.A. reported to have increased Bunker C prices by 15¢ per barrel. (Exh. G-16)

(p) *September 1970:* The settlement between the Libyan Government and the oil companies involved the largest advance in crude oil prices ever recorded. (Exh. A-18)

28. *Tabular Comparative Summaries of Residual Fuel Oil Prices.* The record also incorporates summaries based on trade sources such as are indicated for Finding 27, as follows:

(a) *Quotations on Bunker C, New York and San Francisco, January 1970 - July 1971.*

"1970	New York	San Francisco
Jan.	$2.00	$2.20
Feb.	2.00	2.25
Mar.	2.00	2.25
Apr.	2.15	2.25
May	2.15	2.40
Jun.	2.55	2.40

Jul.	2.90	3.15
Aug.	3.20	3.30
Sep.	3.20	3.30
Oct.	3.65	3.75
Nov.	3.65	3.75
Dec.	3.65	3.75
1971		
Jan.	3.65	3.75
Feb.	3.65	3.75
Mar.	3.95	4.05
Apr.	3.95	4.05
May	3.70	4.05
Jun.	3.70	4.05
Jul.	3.50	3.75"

(Affid. J. Scott Morrison 10/26/71, App. Brf. 10/27/71, citing "Esso International Price List" 4/1/70.)

(b) We have specific prices and dates of increases for Esso International in selected ports worldwide during the bidding period:

Yokohama	31 Dec. 1969 – $14.00 L.T.
1970 Changes	6 Jan. – $14.90, 9 Mar. – $16.10
Los Angeles	31 Dec. 1969 – $2.20
1970 Changes	6 May – $2.35, 13 May – $2.30, 15 May – $2.35
Houston/New Orleans	31 Dec. 1969 – $2.00
1970 Changes	9 Mar. – $2.15, 6 May – $2.30
New York	31 Dec. 1969 – $2.00
1970 Changes	9 Mar. – $2.15, 6 May – $2.30
Channel Ports	31 Dec. 1969 – 127/6 L.T.
1970 Changes	6 Jan. – 137/6, 9 Mar. – 147/6, 7 May – 155/10

Hong Kong	31 Dec. 1969 – $14.58 L.T.
1970 Changes	6 Jan. – $17.46, 9 Mar. – $18.66, 8 May – $19.66 (Exhs. A-14 and 16)

29. *Pertinent General Information Concerning Factors and Events Having a Bearing on Residual Fuel Oil Prices – 1969 and to 3 May 1970.* The U.S. has always been heavily dependent on importation of residual fuel oil, to which virtually no import limitation apply.

30. *Obstacles in 1969 to Distribution of Persian Gulf Crude Oil.* The closing of the Suez Canal in 1967 had inflated the cost of tanker shipment of crude oil from the Persian Gulf to Europe. That was partly compensated for by construction of very large tankers and by the development of so-called "short haul" crude oil by the transportation of Persian Gulf crude oil via the Trans-Arabian Pipeline, known as the TAP, to the terminal at Sidon in the Eastern Mediterranean and by increased production of crude oil in Libya. In 1967 the TAP had been shut down from June to September in connection with the Arab-Israeli war. In 1969 the full benefit of the TAP was not realized because it was again shut down for 110 days from 30 May 1969. (Exh. A-31, G-13; Tr. 1-117, 132)

31. *Demand for Residual Fuel Oil – Tanker Costs.* A substantial expansion occurred in 1969 in the demand for residual fuel oil by consumers in the U.S., Japan, and Europe. The demand in the U.S. was intensified by a shortage of natual gas and the lagging of the nuclear power program. (Exh. G-13; Tr. 1-117)

32. U.S. buyers were able to obtain some residual fuel oil from European refiners, but tanker costs tended

to prevent European refiners from resorting directly to Persian Gulf sources. At the same time Japanese buyers were obtaining both Indonesian low-sulphur crude oil and residual fuel oil from the Persian Gulf. (Exh. G-13)

33. *Third Shut Down of the TAP.* On 3 May 1970 the TAP, which had been transporting 500,000 barrels of crude oil per day from the Persian Gulf area to the Mediterranean terminal, was again shut down, and the amount of "short-haul" crude oil was reduced by that amount per day. The TAP remained unavailable for a period in excess of 130 days, beyond the time of the formation of the instant container agreement. (Exhs. A-31, A-32, A-33, G-13; Tr. 1-143)

34. *Specific Reports Regarding Supply of and Demand for Residual Fuel Oil, and Tanker Rates and Carrying Capacity, 10 December 1969 - June 1970.* The record incorporates the following pertinent information derived from trade sources such as are indicated for Findings 27 and 28:

(a) *10 December 1969: Gulf Coast* – Shortage of regular Bunker C reported. (Exh. G-16)

(b) *17 December 1969: Gulf Coast* – Shortage of residual fuel oil reported. (Exh. G-16)

(c) *18 December 1969: Gulf Coast* – Residual fuel oil reported scarce. (Exh. G-16)

(d) *5 January 1970: Gulf Coast* – Residual fuel oil reported in strong demand and short supply. (Exh. G-16) *New York:* Opinion expressed that tanker rates unlikely to decline sufficiently by summer 1970 to permit Persian Gulf oil shipment via Cape Horn to compete in European markets. *Iran and Arabia* oust Venezuela as No. 1 oil exporter. (Exh. A-20)

(e) *19 January 1970: New York* – 15 million tons of crude oil carrying capacity reported being lost while owners of 100 super-tankers await findings of investigation into explosions on two 200,000 ton tankers in December 1969. (Exh. A-21)

(f) *26 January 1970: New York* – fuel oil consumption in Denmark climbed 17%, and by power plants in Denmark reported to have jumper 30%. (Exh. A-22)

(g) *16 February 1970:* Lower tanker rates not seen hurting Libyan crudes - yet, despite a predicated sharp seasonal drop in long-haul tanker rates. (Exh. A-23)

(h) *4 February 1970: Caribbean* – Upward movement of price of Bunker C reported to be contra-seasonal. (Exh. G-16)

(i) *16 February 1970: New York* -- repetition of substance of report re tanker rates in Finding 34(d). (Exh. A-23)

(j) *6 March 1970: West Coast* – Inventories of residual fuel oil reported shrinking. (Exh. G-16)

(k) *9 March 1970: Gulf Coast:* Worldwide shortage of residual fuel mentioned and expected to last a long time. Refiners reported to attribute shortage to: (1) technological changes in refining permitting refiner to "cut deeper into the petroleum barrel;" (2) increased demand for asphalt in U.S.; (3) declining coal production and dwindling above-ground coal supply, causing buyer interest in residual oil by former coal customers, e.g., increased demand by utilities due to pollution regulations and lack of confidence that comfortable or even adequate coal inventories can be maintained at utility

generating plants. (Exh. G-16)

(l) *10 March 1970: Atlantic Coast* – Residual fuel oil supplies reported tight. Two deep water terminals in South reported to have nearly exhausted Grade No. 6 inventories. New York suppliers reported to have failed to obtain supplies from European refiners. One marketer reported to have attributed world shortage of residual fuel oil to European refiners running light Mediterranean crude oil instead of heavier Persian Gulf Crudes. (Exh. G-16)

(m) *16 March 1970: New York* – Year end (1969) "World Tanker Fleet Review" reported to state (tanker) tonnage needs were expected to rise 13% over 1969, against 14.5% hike in carrying capacity. (Exh. A-24)

(n) *20 March 1970: New York* – Instances in Japan reported of failure to deliver under ship bunkering arrangements; and in the Netherlands that spot quotations not available and some major suppliers have refused to make three-months-in-advance commitments. (Exh. G-16)

(o) *23 March 1970:* European refiners hoping to cash in on soaring fuel oil prices, are turning to Venezuela's heavy crudes to get more product from the bottom of the barrel. *Shell* says economies of using 200,000 ton tankers has marked effect on transport costs. Its total transport costs last year were lower, despite a big increase in volume of oil transported. *Saudi Arabia* is too passing Venezuela's oil output. Its output in February soared 3.8 million barrels over January. (Exh. A-25)

(p) *30 March 1970: New York* – Tanker owners reported to be paying more liability insurance

following tanker explosions of December 1969. (Exh. A-26)

(q) *6 April 1970: New York* – Brokers reported to estimate that 15% of 21.7 million tons of 1970 new tanker deliveries will slip forward into 1971, causing a year's loss for 1970 of 3.25 million tons or a month's supply of tanker capacity arriving in the Persian Gulf for loading. Some of the pressure on Persian Gulf prices, however, will be eased as major oil companies rearrange crude supply patterns to take into account crude supply patterns. (Exh. A-27)

(r) *16 April 1970:* Major supplier of Grade No. 6 reported to be turning away new business; even established customers facing cutbacks because of tight residual fuel oil market. (Exh. G-16)

(s) *20 April 1970:* In March Iranian production rose 20.7%, Arabian output 30.3%, and Kuwait 13.5% but Iraq showed a loss of 6.6%. (Exh. A-29)

(t) *21 April 1970: Gulf Coast* – Shortage of residual fuel oil reported. Refiners reported to believe concept of residual fuel as a "give away" product priced at 60% of the cost of crude is ended. Atlantic Coast - reported that severe shortage of residual fuel oil will continue for at least several months if not longer. (Exh. G-16)

(u) *27 April 1970:* Oil companies with ships to spare - mainly the Americans - are reletting tankers at today's surprisingly high freight rates. What is unusual now is that they can be profitable in spring, when tanker demand and rates generally ebb. Some American firms figured crude import bans would be relaxed

by now and scheduled more tonnage. The barriers did not drop so the ships are available. (Exh. A-28)

(v) *4 May 1970: New York* – European refiners reported to agree that worldwide fuel oil shortage will continue due to: (1) high tanker freight rates; (2) failure of coal (in Germany and the U.S.) and hydro-electric power (in Scandinavia and Switzerland) to meet their anticipated shares of the energy market; (3) diversion to the U.S. of low-sulphur fuel oil; (4) Japan's capacity to absorb Persian Gulf fuel oil. Refiners differ as to whether current prices for residual fuel oil will go down or up - even those prediciting a decline predict prices in excess of those experienced in the summer of 1969 and substantially above the lowest for 1969, experienced in October. (Exh. A-30)

(w) *12 May 1970: Atlantic Coast* – Large marketer reported to predict residual fuel oil shortage will last at least 12 to 16 more months. (Exh. G-16)

(x) The evidence shows substantial further increases in tanker rates beginning in the summer of 1970. (Exhs. A-15, A-32, A-34)

35. *Actual Tanker Rates.* During the bidding period, January to May 1970, tanker rates for the Persian Gulf to the United Kingdom, the European Continent, and Japan rose during January to March, then declined during April and May to the low of the year in the latter month. From the U.S. Gulf to U.S. East Coast, tanker prices declined steadily every month from January through May. From the Caribbean to the U.S. East Coast prices fluctuated so that no general trend was discernable. (Exh. A-15) It therefore appears that

the discussions of extremely high tanker rates in the trade publications, refers to rates relative to prior years, and the failure of such rates to decline sharply.

36. *Vendors in 1969 - Withdrawal of Usual Suppliers.* In 1969 vendors of Bunker C to appellant were Esso, Texaco, Shell, Hess, Mobil, Gulf, Phillips, Chevron, Mitsui, C. Itoh, Humble, and Union. In the fall of 1969 Phillips represented to appellant that because Phillips had to acquire stocks of Bunker C from others, Phillips was losing money on sales to appellant at 1969 prices. As a result appellant actually acquired from Phillips only about half of the quantity of Bunker C contemplated by appellant's contract with Phillips for 1969. When the question of appellant's supplies for 1970 arose, both Phillips and Union declined to supply bunkers to appellant for 1970 on the ground of "lack of adequate stocks and sources of supply." (Exhs. G-3, G-6, G-7)

37. *Vendors in 1970 and 1971.* Vendors of Bunker C to appellant in 1970 were Esso, Shell, Texaco, Humble, Chevron, Gulf, Mobil, C. Itoh, Marubeni, Mitsui and Hess, and in 1971 were Esso, Shell, Texaco, Humble, Chevron, Gulf, Mobil, C. Itoh, Marubeni, Mitsui and Nichimen. (Exh. G-8) Despite all the dire predictions of residual fuel oil shortages, appellant encountered no difficulties in purchasing Bunker C in 1970, either during the bidding period or thereafter. The appellant was able to increase its 1970 purchases over 1969 by 1.4 million barrels. (Exh. A-11) Mr. Johnson explained that reported shortages generally applied to residual fuel overall, but that the bunker fuel supply, worldwide, did not change in 1970, 1971, or 1972. (Tr. 1-114)

38. *Reduction in Libyan Production.* The Libyan revolution began 1 September 1969. Toward the end of December 1969 the Organization of Petroleum Exporting Countries (OPEC) indicated its approval of a new Libyan oil conservation regulation. In late January 1970 negotiations began between the Libyan Government and the oil companies regarding an increase in the posted price of crude oil, accompanied by a warning from the president of Libya to the effect that people who had lived without oil for 5,000 years could live without it again for a few years while his people obtained their legitimate rights; however, this might have been more convincing at the time and during later performances had Libya not already amassed huge financial reserves from oil revenues. The negotiations dragged on without result. (Exhs. A-18, A-22, G-13)

39. In May 1970, at a time not specifically appearing, but apparently after 18 May 1970, the Libyan Government started imposing restrictions on production. The restrictions required five major producers in succession, beginning with the independent oil companies, to reduce their operations, the last reduction being by Esso in September 1970. In April 1970 Libyan production had reached a peak level of 3.7 million barrels per day. The estimated loss to the "short-haul" crude oil supply amounted to 800,000 barrels per day until September 1970. The position of the oil companies in Libya has been described as vulnerable because a substantial portion of the Libyan output of crude oil was produced by independent companies having no other crude oil resources outside of the Western Hemisphere. To supply northwest Europe from the Persian Gulf in lieu of Libya implies a

fourfold increase in required tanker capacity. In the five month period after May 1970 the cost of hauling a barrel of oil on a single voyage basis from the Persian Gulf to northwest Europe rose from about $1.10 to about $3.00 (Exhs. A-18, A-22, A-31, G-13)

40. *Appellant's Cost Estimates and Information.* Appellant's executive vice president for business planning and development, Mr. J. Scott Morrison (who had been vice president in charge of traffic in 1970) testified on direct examination that he was primarily responsible for preparation and submission of appellant's proposal in response to RFP 500; that he relied on information supplied to him by the several managers of appellant's departmental divisions; that for what he described as marine expense, which included fuel among other expenses, he relied on appellant's vice president for marine operations, Captain Warren G. Leback; and that marine operating expense, including fuel among other items, was controlled or measured by a system called "vessel standards." (Tr. 1-4-9)

41. Mr. Morrison testified further on direct examination that he had not foreseen the increases in the price of Bunker C which occurred in the last quarter of 1970 and the first quarter of 1971; that no one he consulted in connection with the response to RFP 500 had suggested to or informed him that Bunker C prices were likely to increase significantly in the period projected by RFP 500; and that in preparing the proposal under RFP 500 appellant had not included a factor for projected increases in the price of Bunker C. (Tr. 1-11)

42. On cross-examination Mr. Morrison testified that his principal source of information regarding Bunker C prices had been Captain Leback; and when asked if he

had on a regular basis reviewed any publications which would or might contain Bunker C price information Mr. Morrison's answer was as follows:

> "A Not in the ordinary course of events. I mean, it is possible that I might have read a magazine article somewhere that referred to it, but I would not have done that in the ordinary course of my activities." (Tr. 1-14)

43. Samples of vessel standards in evidence indicate for each vessel two main types of expense for a single day, one type consisting of wages, payroll taxes and fringe benefits accumulated in a sub-total, the other type consisting of subsistence, insurance, fuel and other miscellaneous expense, also accumulated in a sub-total, the sub-totals then being added together to produce a grand total of expense for one day. All items are shown at a computed total dollar value per item for a day without indication of unit costs of labor or material. (Exh. A-1-A-5)

44. As we understand the testimony of Captain Leback, the portion of a vessel standard devoted to the first type of expense, being labor expense, was automatically determined by appellant's labor contracts, while the portion devoted to the second type, including fuel among other items, would be up-dated in the third and fourth quarters of the year of operation to reflect so far as possible actual costs incurred of the second type. Thus, as we understand it, a vessel standard, starting out as a forecast for the year of operation, tended in the fourth quarter of the year of operation to approximate statement of the actual daily cost of operation. (Tr. 1-31, 33, 34, 36)

45. Captain Leback testified twice on direct examination concerning his role in connection with Bunker C price information. The first time was in relation to his entire period of employment, which began in 1965 and ended in 1972, and consisted of the following:

> "Q During the period 1965 through 1972, who was the person or corporate official at Sea-Land with the primary responsibility for knowledge of bunker fuel prices and markets and contracting for bunker fuel for Sea-Land vessels?
>
> "A I did it. I was responsible for it.
>
> "Q What were your sources of information and knowledge regarding bunker fuel prices?
>
> "A The historic data that we had accumulated each year; the contracts with the bunker representatives or bunker departments, sales departments of the major oil companies, major trading companies; industry reports such as the Journal of Commerce, the pure ship trading magazines that had bunker sections; articles that would come across one's desk from various and sundry areas as to what the price of bunkers or the general forecast of bunkers would be.
>
> "Q Did you receive information of expected bunker price increases?
>
> "A Yes, we did, from time to time. I did from time to time.
>
> "Q From whom would you receive such information?
>
> "A My information came from the bunker sales departments of the various major oil companies and the trading companies that we had contract agreements with." (Tr. 1-29, 30)

The second occasion related specifically to preparation of appellant's response to RFP 500 and consisted of the

following:

"Q Did you participate in Sea-Land's response to RFP 500?

"A Yes. Only to the extent of providing corporate traffic with the vessel operating standards and costs to be incurred.

"Q And did the information which you provided include information with respect to bunker C fuel?

"A Yes, sir.

"Q And in that information, did you seek to project what Sea-Land's experience would be with respect to Bunker C fuel during the period of the contract?

"A Yes, sir.

"Q And in providing that information, what sources of knowledge or information did you use?

"A We used the historical data that we had accumulated since 1960, and then consulted with the bunker sales representatives of those people from whom we were buying the bunker from as to what they thought the price of bunkers were going to do, whether they were going to go up or go down in the various areas of the world.

"Q And what was the period during which you were gathering this information and making the re-evaluation?

"A It was –

"Q With respect to RFP 500?

"A It was during the period that the RFP came out, somewhere in February, and to when it had to be submitted. We had some internal dates to make, and we reviewed the standards we had given on January 1. We reviewed carefully all of the data that went into them, the backup data, and then checked our sources of information as to any

possible increase in expenses during the period of that RFP, the period that RFP was to cover.

"Q And what was your recommendation to Corporate Traffic with respect to the factor to be included in Sea-Land's re-response to the RFP for bunker C fuel?

"A Based on the performance of the years, the prior years, immediate prior years, and the information that we – that I gathered from the oil companies, and their sales representative, I would stay at a $2.00 per barrel rate." (Tr. 1-37-39)

In this connection Mr. Morrison had already testified, on cross-examination, that it had not been unusual for appellant to experience small fluctuations in the price of Bunker C above and below $2.00; and he described appellant's $2.00 per barrel cost estimate as reflecting a range $2.00 plus or minus ten percent. (Tr. 2-18) Its actual average contract price for 1970 was $1.87 (Exhs. A-6, A-9)

46. Captain Leback also testified on direct examination that as of 1 July 1970 he had not at any time foreseen that Bunker C prices would increase as they did in the latter part of 1970 and the early part of 1971; that until the middle of July 1970 he did not foresee substantial increases. (Tr. 1-40, 41)

47. On 24 July 1970 Captain Leback addressed to his immediate executive superior a memorandum written by him, reading as follows:

"Please be advised the fuel oil prices will increase approximately 40% between now and the end of 1970. There are several reasons for this:

1. Worldwide shortage of crude oil caused in part by
   a. Restrictions on the Libyan oil fields

b. Damage to the Trans-Arabian pipeline
c. Reduction in production in Venezuela
d. Lag in Alaskan oil field startup.

2. Increase in tanker freight rates based on
   a. Damage to the Trans-Arabian pipeline
   b. Continued closure of the Suez Canal
   c. Increased demand worldwide for tankers
   d. Scrapping of old obsolete tanker tonnage in the years 1968 and 1969 without equivalent deliveries during these years.
3. A reduction in the heavy crude oil production in the world from which bunker fuel is obtained. Most of the new fields brought into production during the last several years are the lighter crudes. Therefore, these crudes must be extended with the higher priced distillate fuels.
4. Increased demand by public utilities for bunker fuels because of
   a. Shortage of satisfactory coal (Coal exports have increased.)
   b. An increase in the cost of natural gas from 2¢ per thousand cubic feet to 22¢ per thousand cubic feet, making this fuel non-competitive with bunker fuel.

"We have investigated the possibility of taking the remaining bunker allocations for the year and re-negotiating with one or two oil companies. This, however, is fraught with danger since all oil companies admit they cannot supply the required quantities at all ports. We have been, and will continue to discuss with the oil companies the price structure.

"We have a sufficient cushion in the bunker reserve to cover the actual purchases through the third quarter. However, it looks as though we will have to increase our bunker fuel reserves for the fourth quarter so as to prevent an override in this area." (Exh. A-10)

48. The substance of Captain Leback's explanation on direct examination of the sources of the above information concerning the anticipated increase (Finding 47) was as follows:

> "Q And what were the sources of information that you used in preparing that memorandum?
>
> "A Well, because of the fact that we were a – that is, Sea-Land was a substantial customer in bunker fuel, our bunker requirements in barrels were running well over 4 million, which was a fuel bill of well over $8.5 million a year or thereabouts, and the method in which I had handled the bunker allocation since 1965, almost all of the bunker sales representatives, or those people charged with servicing the account at Sea-Land, would call me personally if they felt there was going to be any problems involved in the cost of bunkers, the supply of bunkers. . . . because we were a volume buyer, a very large customer, and the way we handled the contracts on an allocated basis, I would get information beforehand as close as they could give it to me before it happened.
>
> "If I recall correctly, it started to develop somewhere around July 15th that I began to receive calls from the various bunker representatives advising me things could tighten up and would possibly become tighter during the latter part of 1970 and the beginning of 1971; hence the memorandum to my immediate superior. . . ." (Tr. 1-41-42)

49. With respect to the information acquired in July 1970 from oil company representatives, Captain Leback testified on cross-examination that he had also acquired information then, or possibly prior to July 1970, from various national periodicals "such as Time, Newsweek

and Forbes" that "some problems were in the offing." (Tr. 1-59)

50. Later on, the cross-examination of Captain Leback reverted to the question of the information available to him for preparation of cost estimates and vessel standards around the end of 1969, as follows:

"Q I believe you testified this morning that the sources you relied upon for bunker fuel oil price information included historical records and contracts with representatives of major oil companies.

"A Yes.

"Q And I think too you mentioned some shipping trade magazines. Did you on a regular basis follow the publication entitled "Petroleum Press Service"?

"A No.

"Q How about the "Petroleum Intelligence Weekly"?

"A No.

"Q How about the "Platt's Oilgram"?

"A No. Those periodicals or reports were designed primarily for the broker and the charterers and not so much for the liner operator such as we were. We would have very little interest in what the contents of those reports were. They were designed more for the bunker sales end of it, the bunker broker, and the charterer.

"Q Except to the extent you might be interested if they showed trends in the fuel oil that might eventually impact upon the price of bunkers?

"A If it had that much of an effect, we, as a large consumer of Bunker C as we were, we would have had these available to us. We just didn't feel they gave us the information that was necessary. [Tr. 1-68, 69]

* * *

"Q . . . As I understand it, your forecast of vessel standards for fuel oil prices each year was based primarily on the statistical experience from the previous year or years, I guess that we would refer to as historical records. Is that correct?

* * *

"A Well, fuel was based on the past experience, plus a discussion with the suppliers as to what they thought the market was going to do, and then we came down to discussing what we should pay in view of our past experience and what they thought the market was going to do.

"Q That's right. So if you didn't get any advice from the representatives of major oil companies which indicated a major change one way or the other, then you would rely on your historical records?

"A That's right. Yes." (Tr. 1-69, 70)

51. During cross-examination of Captain Leback the question was raised as to whether appellant's contracts with major oil companies for bunker fuel had a firm fixed price for the entire contract period, as follows:

"Q Did you have firm fixed price contracts with the major oil companies for bunkers? That is, were these prices subject to change, or were they fixed for the entire period of the contract?

"A The posted price could change during the life of the contract. The discounts on volume purchases would remain the same during the year.

"Q So your contracts were tied to the posted price, except for the discount, and the posted price could go up or down on rather short notice, I suppose?

"A Very short notice." (Tr. 1-67, 91, 92)

52. Captain Leback also testified on cross-examination that notwithstanding the costs per barrel above $2.00 incurred by appellant in the years 1965 through 1968 (Finding 25), appellant consistently estimated future costs at $2.00 per barrel and had done so even before 1965, and that this had been done by most operators since about 1960. (Tr. 1-71, 72)

53. Captain Leback also testified on cross-examination that appellant sometimes in the period 1965 - 1970 and thereafter paid a higher price per barrel than that offered by a competitor of the supplier at a particular port because of the necessity of relying on the higher cost source at some other port. (Tr. 1-86, 88).

54. Captain Leback reiterated on cross-examination his reliance on information from the oil companies, i.e.:

> "... we would have been very well aware of any substantial or minor changes that were going to come up in the price structure, because of our relationship with the oil companies, and the fact they were treated fairly and they knew this; to wit, even when Phillips and Union withdrew voluntarily, I protected them against the fact that if they came back in two years later when this stock and their position improved, that it was on the record in the bunker files that they withdrew because of, not for lack of service or lack of servicing the contract or exorbitant prices, but they had problems. If they could become competitive because their stocks were built up, they would be given another opportunity to compete with the other majors." (Tr. 1-94, 95)

55. *Information of Suppliers.* Appellant's third witness was Mr. Kenneth H. Johnson, then president of Kristensons - Petroleum Inc., New York, an independent buyer, seller and broker in marine fuels which was a supplier of bunker fuel to appellant at the time of the hearing in July 1975 and had done so for about a year and a half prior thereto. From 1966 to November 1970 Mr. Johnson had been in charge of Atlantic region sales for Chevron. He testified on direct examination that, acting for Chevron in that period, he had engaged in supplying bunker fuel to appellant and had the following sources of information: Trade journals such as Platt's Oilgram, Petroleum Intelligence Weekly, Petroleum Press Service, Fair Play, Sea Trade, and the Journal of Commerce; the economic and planning staffs of Chevron; and daily contact with both the contractual and spot markets. Also, in preparing to testify concerning the question of the foreseeability of the use in Bunker C prices in the middle and latter part of 1970 he was permitted to use facilities of Gulf and Mobil. (Exh. A-12; Tr. 1-102-109, 129, 130)

56. From the information available to him Mr. Johnson compiled the chart received in evidence as Exhibit A-14. (Tr. 1-109, 110; Finding 24, above) Mr. Johnson testified further on direct examination that marine fuels are normally contracted for on an annual basis; that the Chevron sales force had its annual meeting in October 1969, oriented toward 1970, and "were presented with the corporation's views on supply, the corporation's views on economics, and the objectives as far as sales were concerned"; that the sales force was told by the corporate management at that time that Chevron anticipated it would be in a surplus position for two years with respect to bunker fuels; and

that the sales force was told to go out and increase sales, and was given the prices to negotiate with. As a result, according to Mr. Johnson, the 1970 annual contracts were entered into in the period December 1969 - March 1970 without significant changes in prices but with deeper volume discounts than those which had prevailed in 1969. (Tr. 1-112, 113, 115)

57. Mr. Johnson also testified on direct examination that the price of bunker fuel moved up in the second quarter of 1970 due, he said, to the sustained high level of tanker rates. He recognized that increases in tanker rates had occurred in 1969 as well as an increase in the demand for residual fuel oil. (Exh. A-13; Tr. 1-114-119)

58. Mr. Johnson's explanation of the reason that sellers of bunker fuel have a posted price which "floats" was that such fuel has to be transported at least once, and in most cases twice, and has to be stored, before it reaches the consumer, making the price of the fuel sensitive to increases in transportation costs. (Tr. 1-119) According to Mr. Johnson a chart prepared by him and received in evidence, shows a rise in tanker rates in May 1970 followed by increases by the major oil companies in the posted prices of Bunker C. (Exh. A-13; Tr. 1-119, 120)

59. Mr. Johnson testified on direct examination that it became apparent early in the second quarter of 1970 that Libya was going to readjust its method of operating with the major oil companies. (Tr. 1-121) However, he expressed the opinion that the increases in bunker fuel prices which occurred after 1 July 1970 were not reasonably foreseeable on 10 April 1970, stating further in response to a question as to whether those prices were foreseeable as of 1 July 1970:

> "A As of July 1 we knew we were in trouble. We did not know how much. It was a question of magnitude at that point. That way we had no way yet of telling. There was a conflict. We knew a conflict in the sense of breakdown of negotiations, shut in of crude oil production, disruption of the tanker rates, but the question in our mind was how long would it last? We felt in the latter half of June that price increases in June would have been the last ones. As bunker peddlers, we felt that was it. We felt that the market had probably peaked, the negotiations were finally being addressed seriously. By 'negotiations' I mean between the major oil companies and the Libyan government. We did not foresee any further price increase." (Tr. 1-125, 126)

He also testified at this time that he did not know of anyone in the oil industry who had foreseen the increases in the price for Bunker C which occurred in the latter part of 1970 and the early part of 1971. (Tr. 1-128)

60. On cross-examination Mr. Johnson acknowledged the effect of the super-tanker explosions in December 1969. (Tr. 1-134, 135; Findings 34(e), 34(o), above)

61. Mr. Johnson on cross-examination also testified that it was a long standing practice in the oil business to resort to annual contracts for the sale of bunker fuels for off-shore consumption on the basis of tying the price to a posted price which could change or "float" at the will of the sellers; and that a different practice had prevailed for sales for on-shore use, to customers such as utilities, which had been handled on a fixed-price basis (changed later, around 1970, to fixed price plus escalation). (Tr. 1-144-146)

62. Elsewhere in the record it appears that the

concept of a "floating" price does not apply to annual contracts entered into by the Defense Fuel Supply Center, Defense Supply Agency, Department of Defense, for the acquisition by DFSC of bunker fuels on its own account. (Tr. 2-8, 15)

CONCLUSIONS

A. Sea Land did not in fact foresee the drastic increase in the cost of bunker fuel which occurred during the contract period. (Findings 40-46, 50-53, 61, 63)

B. It was reasonable for Sea Land to rely, to a great extent, upon its past experience in bunker fuel prices and upon the advice of its suppliers, to whom it was an important and preferred customer. (Findings 44-45, 52-56) Sea Land should not have ignored the general rising trend in bunker fuel prices in the first five months of 1970, up until the proposal cut-off date of 20 May. It should have also, as a very large consumer of fuel oil, taken greater notice of the trends and predictions in trade publications which indicated that prices would continue to rise or, at least, would remain high. (Findings 27-35) Appellant's fuel costs were, however, only a minor part of the costs of ship operation. It could not be expected to engage in sophisticated economic analysis of price trends in the oil market. Bunker C prices rose approximately 15% from January to 20 May 1970. It may have been reasonable to assume the trend of rising prices would continue for some indefinite period. However, any one of the factors pressing prices upward might be

temporary, so that it cannot be said that it was predictable that all of them would converge and continue through the contract period. We conclude that some price increase, above the usual $2.00 per barrel rate used by Sea Land, should have been anticipated.

C. We further conclude that the drastic increase in prices which actually occurred during the period of this contract was not reasonably foreseeable. Prices were rising, but not at an extremely sharp rate. (Findings 26-28) Tanker rates were high and did not fall seasonably as rapidly as expected, but they were reduced sharply in April and May, the last months of the proposal period. (Finding 35) There were spot shortages of bunker fuel, but none worldwide, and appellant was able substantially to increase its 1970 purchases. (Findings 35-37) The Libyan negotiations were potentially explosive, but there was no current prediction by the oil companies or the press that production would be severely curtailed. During the January-May negotiations of the oil companies with Libya, production was actually increased to record highs. (Finding 39) So far as this record shows, there were no published forecasts that Libyan oil prices would rise to an unprecedented extent as the result of the negotiations. And finally, there is no evidence that anyone, including the oil companies and [illegible] experts, or oil users, including the United States Department of Defense, actually foresaw or predicted the high prices that actually occurred during the fiscal year 1970-71, the period of Sea Land's contract.

Dated 30 April 1976

/s/ Harris J. Andrews, Jr.
HARRIS J. ANDREWS, JR.
Administrative Judge
Vice Chairman, Armed Services
Board of Contract Appeals

I *dissent* as to the forseeability of the drastic increase in the price of bunker fuel, as per attached memo.

/s/ Beverly Tucker Thompson
BEVERLY TUCKER THOMPSON
Administrative Judge
Member of Division No. 2
Armed Services Board of
Contract Appeals

I *dissent* as to the finding that drastic increase in bunker fuel price was not reasonably forseeable, for reasons set forth in Judge Thompson's dissenting opinion.

/s/ J. M. Brown
J. MITCHELL BROWN
Administrative Judge
Member of Division No. 2
Armed Services Board of
Contract Appeals

I *concur*

/s/ Daniel M. Arons
DANIEL M. ARONS
Administrative Judge
Vice Chairman and member,
pro tem, of Division No. 2
Armed Services Board of
Contract Appeals

ALAN M. SPECTOR
Administrative Judge
Member of Division No. 2,
Armed Services Board of Contract
Appeals, did not participate in the
determination of this appeal.

(Signatures continued)

I *concur*

/s/ Richard C. Solibakke
RICHARD C. SOLIBAKKE
Administrative Judge
Chairman, Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the decision and opinion of the Armed Services Board of Contract Appeals in ASBCA No. 16218 (Reinstated), Appeal of Sea-Land Service, Inc., rendered in conformance with the Board's Charter.

Dated:

GEORGE L. HAWKES, Recorder
Armed Services Board of
Contract Appeals

DISSENTING OPINION

I dissent from the conclusion that the drastic increase in the cost of bunker fuel was not reasonably foreseeable by appellant.

Sophisticated economic analysis was not required to predict the increase in bunker fuel costs which occurred. Captain Leback's memorandum of 24 July 1970 simply and correctly summarized the factors which led to the increase, and he predicted a drastic increase at that time. (Finding 47) The cost generating factors reflected in Captain Leback's memorandum were present, and constituted information available to buyers and sellers of bunker fuel, prior to 20 May 1970 and for the most part also prior to 10 April 1970.

Among the factors was the increased demand for residual fuel oil that had become evident in 1969, continued and was well known in the first quarter of 1970, and was further manifested by spot shortages in April 1970. (Findings 31, 34(d), 34(h), 34(j), 34(k), 34(l), 34(n), 34(o), 34(r), 34(t), 34(y), 34(w), 57)

Also, it is significant that the demand for tanker capacity and shortages in tanker capacity, which had arisen in 1969 following the second closing of the Trans-Arabian pipeline, and the ensuing rise in tanker transportation rates, all continued into 1970 and were well known prior to 10 April 1970. (Findings 32, 34(d), 34(e), 34(i), 34(m), 34(p), 34(q), 57, 58, 60) Although there is evidence of a small decline in tanker rates from April to May 1970, tanker rates at that time for the key routes from the Persian Gulf to Europe and to Japan were still double the rates which had prevailed in the spring of 1969. (Exhs. A-15, A-28; Finding 45) According to appellant's own evidence the price of bunker fuel is particularly sensitive to changes in transportation costs because the oil usually has to be transported more than once. (Finding 58)

The drastic upward trend in tanker transportation costs was aggravated by the third closing of the Trans-Arabian pipeline and the "conservation" actions of the Libyan government. The pipeline was closed on 3 May 1970 and remained closed for more than 130 days; and the Libyan threat announced in January 1970 to shut down oil production was still present on 20 May 1970. (Findings 38, 39)

In view of the foregoing circumstances I would conclude that appellant reasonably could have foreseen the drastic increase in the price of bunker fuel as likely to arise.

/s/ Beverly Tucker Thompson
BEVERLY TUCKER THOMPSON
Administrative Judge
Member of Division No. 2
Armed Services Board of
Contract Appeals

APPENDIX D

IN THE UNITED STATES COURT OF CLAIMS

No. 331-72

SEA-LAND SERVICE, INC.

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges.*

ORDER

This case comes before the court on plaintiff's motion, filed September 6, 1973, for summary judgment, and on defendant's cross-motion, filed February 6, 1974, for summary judgment. The case has been submitted on the briefs and oral argument of counsel.

For the purposes of their motions for summary judgment, both parties have assumed that the drastic increase in the cost of bunker fuel, on which plaintiff predicates its claim, was neither foreseen by plaintiff when it entered into the contract on July 1, 1970, nor reasonably foreseeable at that time as likely to arise during the contract period. The Armed Services Board of Contract Appeals made the same assumption and did not, in view of its legal holding, determine the factual

correctness of that assumption. The materials and arguments presented to the court on these cross-motions for summary judgment do not show either that the defendant concedes the correctness of the assumption or that there can be no proper dispute over the point. Without passing in any way at this time upon the legal issue of whether plaintiff can recover if the basic factual assumption is in fact correct, the court is of the view that there should first be a definitive determination of that factual question. The ultimate disposition of the case will be facilitated and may be quickened by following that course. The appropriate tribunal to make the factual finding in the first instance is the Armed Services Board of Contract Appeals, and the case should be remanded for that purpose.

IT IS THEREFORE ORDERED that (a) the case is remanded to the Armed Services Board of Contract Appeals, under Public Law 92-415 and General Order No. 3 of 1972, to determine whether the drastic increase in the cost of bunker fuel, on which plaintiff predicates this claim, was foreseen by plaintiff when it entered into the contract on July 1, 1970, or was reasonably foreseeable at that time as likely to arise during the contract period;

(b) plaintiff's attorney shall be responsible for keeping the court advised periodically as to the status of the proceedings on remand; and

(c) if further proceedings are had in this court after completion of the remand proceedings, the parties shall be free to raise and present, in addition to contentions relating to issues arising out of the remand proceedings, the issues and arguments presented on the current cross-motions for summary judgment.

BY THE COURT

/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

Supreme Court, U. S.
FILED
DEC 8 1977
MICHAEL RODAK, JR., CLERK

No. 77-488

In the Supreme Court of the United States

OCTOBER TERM, 1977

SEA-LAND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

LEONARD SCHAITMAN,
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Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A) is reported at 553 F. 2d 651. The initial opinion of the Armed Services Board of Contract Appeals (Pet. App. B) is reported at 72-2 BCA para. 9605. The Board's opinion on remand (Pet. App. C) is reported at 76-1 BCA para. 11,884, and its denial of the motion for reconsideration at 76-2 BCA para. 12,005.

JURISDICTION

The judgment of the Court of Claims was entered on April 20, 1977. Petitioner's motion for rehearing was denied on June 24, 1977. Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including September 28, 1977, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioner's contract with the Navy authorized an upward rate adjustment for bunker fuel increases.

STATEMENT

Petitioner, a common carrier by water within the Shipping Act of 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, entered into a contract with the Military Sea Transportation Service (now the Military Sealift Command ("MSC")) of the Department of the Navy for the transportation of containerized cargo between the United States and various foreign ports from July 1, 1970, to June 30, 1971 (see Pet. App. A, pp. 1a-7a). Petitioner executed all shipping orders it received during the contract period at the rates provided in the contract (Pet. App. B, p. 19b). However, on January 4, 1971, petitioner applied to MSC for a bunker fuel surcharge because of a "drastic increase in the cost of bunker fuel * * * world-wide" (Pet. App. A, p. 7a). The contracting officer rejected the application on the ground that the contract did not provide for such a surcharge (*ibid.*).

On January 18, 1971, petitioner, purporting to act in accordance with Article I:9(b) of the contract,[1] nominated, as an additional item of cost, a bunker surcharge of $2 per measurement ton to cover bunker fuel

[1]Article I:9 provided (see Pet. App. A, pp. 4a-5a):

(a) As a means of facilitating the administration of this Agreement, the parties have agreed that certain specific items of cost anticipated as likely to arise in the performance of their respective duties under Articles I:5, I:6 and I:8 shall be listed, and the responsibilities of the parties indicated, in a schedule attached hereto as Appendix B * * * and made a part of this Agreement. Determinations of responsibility for specific items of cost agreed to by the parties under this Article are to be consistent with the general language of Articles I:5, I:6 and I:8; provided, however, in the event of conflict, the specific language of Appendix B shall prevail.

(b) Either party may nominate changes to or additional items of cost and cost responsibility to be incorporated into Appendix B. Such nominating party shall serve upon the other party a written nomination, together with a detailed statement of all pertinent facts and appropriate supporting data necessary for a determination of the cost responsibility under Articles I:5, I:6 and I:8. If the other party agrees in writing to the nomination, such nomination will be incorporated into Appendix B as of the agreed effective date. Failure of the other party to agree to the nomination within a period of thirty (30) days from its receipt, or within a mutually agreeable greater period, shall constitute a dispute concerning a question of fact within the meaning of that term in the Article entitled "Disputes" in Part III of this Agreement.

price increases (Pet. App. A, p. 7a). The contracting officer rejected petitioner's nomination, and the Armed Services Board of Contract Appeals affirmed (Pet. App. A, pp. 7a-8a). The Board held that petitioner's interpretation of Article I:9(b) would frustrate the principal purpose of the relevant contract provisions, which was "to place the risk of increases in bunker fuel costs (and the benefit of any decline) on the carrier" (Pet. App. B, p. 23b).

Petitioner sought review of the Board's decision under the Wunderlich Act, 68 Stat. 81, 41 U.S.C. 321 and 322.[2] The Court of Claims granted summary judgment in favor of the government, holding (Pet. App. A, p. 10a):

[2]The Court of Claims initially remanded the case to the Board of Contract Appeals to determine whether the increase in the cost of bunker fuel was foreseen or reasonably foreseeable by petitioner when it entered into the contract. The Board found that the price increases were not foreseen by petitioner and that they were not reasonably foreseeable (Pet. App. C, pp. 1c-44c).

> * * *[T]he contract is a fixed price contract under which [petitioner] was to furnish specified services for specified payments for a period of one year. There was no provision for escalating the amounts that would be paid to [petitioner]. [Petitioner] would engraft an escalation clause on the fixed price contract, which cannot be done in the circumstances of this case.* * * [The increase in price of the bunker fuel] was a risk it assumed under the terms of the contract.

ARGUMENT

The Court of Claims' interpretation of these contract clauses to preclude recovery of increases in bunker fuel prices is correct. It also lacks prospective importance. All subsequent contracts between the Military Sealift Command and ocean common carriers have contained a clause permitting adjustments to accommodate bunker fuel cost fluctuations and have provided for revision of rates at six-month intervals. They do not include paragraph (b) of Article I:9. Accordingly, this case does not warrant review by this Court.

1. Petitioner's principal contention is that recovery of bunker fuel price increases is authorized by Article I:9 of the contract, particularly the first sentence of Article I:9(b), which states that "[e]ither party may nominate changes to or additional items of cost and cost responsibility to be incorporated into Appendix B" (Pet. App. A, p. 5a). Petitioner argues that an interpretation precluding recovery of price increases would render this article "meaningless" (Pet. 9-11).

Petitioner misconceives the purpose of the nomination procedure. Appendix B of the contract (Pet. App. B, pp. 10b-13b) allocates the responsibility for categories of cost to either the carrier or the government. "Appendix B

describes costs only by nature, kind, or character without regard to any dollar amount and without any warranty against inclusion of contingency factors in rates" (Pet. App. A, p. 11a). The nominating procedure in Article I:9(b) provided a mechanism whereby either party can propose that responsibility for a listed category of cost be shifted or that additional categories of cost be added.[3]

By contrast, petitioner sought to shift responsibility for increases in the cost of a category that had already been allocated to the carrier. The contract made no provision for the shifting of increases in cost of items the responsibility for which had already been allocated. As the Court of Claims stated (Pet. App. A, p. 11a):[4]

> Contrary to [petitioner's] assumption, the contract * * * is cast in terms which provide that the risk of dollar increases in cost of the items of cost assigned to the carrier shall be covered by the stipulated rates. Article I:5(a)(i) makes transportation of the container * * * the basic service for which rates are to be paid. Article I:3 makes the rates the compensation to be paid. Appendix B1c(13) makes costs in connection with the operation of the vessel [which includes bunker fuel costs] part of the cost responsibility of the carrier.

---

[3]Should the carrier or the government assume new responsibilities as a result of such nomination, any change in price would be negotiated to reflect the change in cost responsibility.

[4]There is nothing in the record supporting petitioner's apparent assertion (Pet. 12) that it was the purpose of Article I:9 to provide adjustments for unforeseen or unforeseeable cost changes. The Board "found nothing * * * which would support [petitioner's] view that freight rates can be escalated under Article I:9(b) to reflect increased costs of bunker fuel" (Pet. App. B, p. 20b).

Accordingly, the Court of Claims correctly concluded that "[t]he nomination of the increased cost of fuel was neither the nomination of a change to an existing item, nor the nomination of an additional item" (Pet. App. A, p. 11a; emphasis omitted). This conclusion is further supported by the language of Article I:9 itself, which requires that determination of "responsibility for specific items of cost agreed to by the parties under this Article are to be consistent with the general language of Articles I:5, I:6, and I:8" (Pet. App. A, pp. 4a-5a). Article I:5 in turn states that the carrier "shall be paid at the basic rates set forth in the schedule of rates" (Pet. App. A, p. 3a), and "under Article I:20 the specified rates were to continue unchanged for the period of one year" (Pet. App. A, p. 10a). Petitioner's "nomination [did] not comply with this article" (Pet. App. A, p. 11a).[5]

2. Petitioner contends (Pet. 13) that the government subsequently acknowledged its obligation to pay the bunker fuel increases by adding an escalation clause to the follow-on contract to cover fluctuations in cost of bunker fuel. The Board specifically found, however, that "MSC has not issued any interpretation inconsistent with that expressed by the contracting officer in connection with the present claim" (Pet. App. B, p. 19b). "It is well settled that only actions and interpretations which occur before a controversy arises are relevant in determining and interpreting the meaning of a contract. See *Liles Constr. Co.* v. *United States*, 197 Ct. Cl. 164, 455 F. 2d 527

---

[5]Petitioner argues (Pet. 12-13) that any ambiguity in Article I:9 should be resolved against the government, which drafted the contract. But as the Court of Claims concluded (Pet. App. A, p. 12a), Article I:9 "is unambiguous and there is no requirement that it be construed against the government. *See ITT Arctic Services, Inc.* v. *United States*, [524 F. 2d 680 (Ct. Cl.)]."

(1972); and *Dynamics Corp. of America* v. *United States*, 182 Ct. Cl. 62, 389 F. 2d 424 (1968)" (Pet. App. A, p. 12a).

3. Petitioner also asserts (Pet. 12) that in interpreting the contract the Court of Claims should have considered the alleged custom of the trade in assessing bunker fuel surcharges. But as the Court of Claims noted, "there was no evidence as to the custom of the trade, except that relating to custom in 1972, and thereafter, after [petitioner's] contract had expired and escalation provisions had been inserted in follow-on contracts" (Pet. App. A, p. 12a). In any case, Article I:12 of the contract makes "custom of the trade" applicable only "[w]herever the 'Custom of the Trade' is the standard of performance * * * under the provisions of these basic Terms" (Pet. 9, n. 19). "Custom of the trade" is not referred to in Articles I:9, I:3, or I:5(a), or in Appendix B.[6]

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[6]The Court of Claims' decision is not in conflict with *DeBry and Hilton Travel Services, Inc.* v. *Capitol International Airways, Inc.*, 541 F. 2d 855 (C.A. 10), which turned on a clause subjecting the contract to the terms of tariffs on file with the Civil Aeronautics Board. There was no such clause in petitioner's contract.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

LEONARD SCHAITMAN,
ROBERT KAPLAN,
Attorneys.

DECEMBER 1977.

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OCTOBER TERM, 1977

No. 77-488

SEA-LAND SERVICE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-488

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PETITIONER'S REPLY MEMORANDUM

Petitioner respectfully submits this brief Reply Memorandum to the new allegation raised by the United States that this case "also lacks prospective importance."[1] This case has important prospective significance.

Petitioner questions the right of the United States Court of Claims to remand a proceeding to any agency for factual findings[2] on a question of contract

[1] Brief for the United States in Opposition, No. 77-488, p. 4.

[2] Appendix D, pp. 1d, 2d.

interpretation, under a statute which makes findings of fact by the agency binding on the Court (in the absence of other findings),[3] and then to ignore those findings in interpreting the contract. This is the course which the Court of Claims followed here. The Court's decision, under these circumstances, is contrary to Wunderlich Act standards. The process at issue here applies to all future cases which the Court of Claims remands for findings of fact, and any future cases in which the Court refuses or fails to give effect to findings of fact of the department, agency or board entered on remand. Further this case raises issues that could apply generally to any cases which a court remands for specific findings.

Here the Court of Claims remanded the proceeding for two specific findings of fact[4] –

> "to determine whether the drastic increase in the cost of bunker fuel, on which plaintiff predicates this claim, was foreseen by plaintiff when it entered into the contract on July 1, 1970, or was reasonably foreseeable at that time or likely to arise during the contract period."

Appellant engaged in lengthy proceedings, including evidentiary hearings, and initial and reply briefs,[5] and obtained a favorable decision from the Armed Services Board of Contract Appeals (Board) on the two factual

[3] Wunderlich Act, 41 U.S.C. §321.

[4] Appendix D, pp. 1d, 2d.

[5] Appendix C, p. 3c. The Order of remand was May 31, 1974. (Appendix A, p. 9a). The case returned to the Court of Claims in 1976 and was decided in April 1977 (Appendix A, p. 1a).

issues remanded.[6] The Wunderlich Act makes these findings of fact final and conclusive on the Court of Claims unless the Court finds the decision of the agency or board fraudulent, capricious, arbitrary, so grossly erroneous as necessary to imply bad faith, or not supported by substantial evidence.[7] This point is well settled.[8] The decision of the Court of Claims subject to this Petition referred to the remand, but did not address the findings of the Board on remand in interpreting the contract,[9] as it was obliged to do.

Petitioner does not assert that the Court of Claims has a duty to remand cases. However, once the Court has done so and has requested specific findings on remand, it cannot then ignore those findings in its ultimate decision.

Thus the decision and decision-making process for which Petitioner seeks review apply to many future cases, which the Court of Claims remands for findings of fact, and which other courts may remand for appropriate findings. Accordingly, the case clearly has "prospective significance."

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[6] Appendix C, pp. 3c-4c, 40c-41c.

[7] 41 U.S.C. §321.

[8] United States v. Carlo Bianchi and Co., 373 U.S. 709 (1963); United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966); S&E Contractors v. United States, 406 U.S. 1 (1972).

[9] Appendix A, pp. 9a-12a.